EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

1593 No. 5618

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

1587

FEDERAL SURETY COMPANY, A CORPORATION,
Appellant,

vs.

ALBERT LALONDE, R. E. PECK AND WILLIAM POWERS,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF.

WARE & MELRIN,
1150 Baker Building,
Minneapolis, Minnesota,
O. B. KOTZ,
402 Ford Building,
Great Falls, Montana,
Attorneys for Appellant.

HURD, RHOADES, HALL & MCCABE,
Great Falls, Montana,
Attorneys for Appellees.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

Page.

Statement of case 1

Statement of facts 2

Specification of errors 5

Argument 13

I. The appellant having expended more than the penalty of its bond in completing the work, respondents cannot recover in this action 13

A. In connection with the construction of the work the surety expended, in addition to the amounts received from the Highway Department, a sum in excess of the penalty of its bond 15

B. Amount expended by surety to complete work 16

C. The liability of the surety cannot exceed the penalty of its bond 20

D. Under the Montana statute an auditor may testify concerning deductions made from an audit 20

Conclusion 35

CASES CITED.

Page.

Babcock v. Wilcox & American Surety Co. (C. C. A., 8th Cir.), 236 Fed. 340 20

U. S. v. Mace (C. C. A., 8th Cir.), 281 Fed. 635... 20

Silver v. Eakins (Montana), 175 Pac. 876..... 22

Continental Oil Co. v. Montana Concrete Co., 62 Montana 223 23

Stackpole v. Hallihan, 16 Montana 40..... 23

Stadler v. First National Bank, 22 Montana 190. 23

Largey v. Chapman, 18 Montana 563..... 23

McKeever, et al., v. Oregon Mortgage Co. (Montana), 198 Pac. 752..... 23

Globe Manufacturing Co. v. Harvey (Cal.), 196 Pac. 261 23

McPherson v. Great Western Milling Co. (Cal.), 186 Pac. 803..... 24

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

FEDERAL SURETY COMPANY, A CORPORATION,
Appellant,

vs.

ALBERT LALONDE, R. E. PECK AND WILLIAM POWERS,
Appellees.

APPELLANT'S BRIEF.

STATEMENT.

This case was commenced by the respondents in the United States District Court for the District of Montana as an action at law to recover from the appellant and one C. H. Windsor amounts claimed to be due on account of the execution and delivery of a certain bond to the respondents. The defendant, C. H. Windsor, was not served with process and did not appear. A stipulation waiving a jury trial was filed and the case was tried to the court without a jury. At the conclusion of the testimony the respondents requested the court for findings of fact and order for judgment for the defendant on all the issues tendered by the pleadings. The motion was denied and ex-

ceptions thereto were taken. Thereafter and on the 15th day of June, 1928, judgment was filed in favor of the respondents and against the appellant in the sum of $11,272.35 and for costs and disbursements in the amount of $570.05. The case is now before this court for hearing on the appeal prosecuted by the appellant.

STATEMENT OF FACTS.

The respondents, a copartnership doing business under the firm name of LaLonde, Peck and Powers, were engaged in road construction work. On September 12th, 1924, the contractors entered into a contract with the state of Montana for the construction of a portion of a highway (R., pp. 74 to 79). The state promised to pay to the contractors for this work approximately the sum of $64,918.55 (R., p. 75). In conformity with the Montana statute, on the 12th day of September, 1924, the respondents, as principals, and the Federal Surety Company, as surety, executed and delivered to the state of Montana a bond in the sum of $32,459.27 to indemnify the state against any loss it might sustain by reason of the failure of the respondents to complete the project, and also to guarantee the payment of claims to third party materialmen and laborers (R., pp. 213 to 215).

The respondents never performed any of the work under their contract with the state of Montana, but on the 27th day of October, 1924, entered into a written subcontract with C. H. Windsor under the terms

of which Windsor promised and agreed to construct the highway in consideration of receiving from the respondents 87½% of the amount which the contractors were to receive under their contract with the state of Montana (R., pp. 80 to 87).

On the 27th day of October, 1924, C. H. Windsor, as principal, and the Federal Surety Company, as surety, executed and delivered to the respondents a bond in the penal sum of $28,500.00 to indemnify the contractors on account of any loss they might sustain by reason of the failure of C. H. Windsor to carry out the provisions of the contract in the foregoing paragraph described (R., pp. 88 to 92). This bond contained a condition that if C. H. Windsor defaulted in the terms of his contract with the respondents, that then and in that event the appellant would have the right at its option to proceed with the performance of the contract, and that if it should elect to complete said contract it should thereupon immediately be subrogated to all rights of the principal and of the respondents in and to all payments due at the time of the default or thereafter to become due under the contract (R., pp. 89 and 90).

The original contract between the state of Montana and the respondents required the completion of the project on or before November 1st, 1925 (R., p. 75). Approximately ten days before the time specified for completion, Windsor ceased work on the project (R., p. 97, see also memorandum decision of the court). The trial court found that most of the work had been done for a distance of about seven miles (see memorandum decision). The contract re-

quired the completion of approximately 10.68 miles (R., pp. 74 and 75).

On or about October 24th, appellant exercised the option contained in its bond delivered to respondents and proceeded to complete the contract. The parties agreed that the surety would not by taking over and completing the work waive any rights it had (see memorandum decision of the trial court, see also Exhibit 8, R., pp. 104 and 105; Exhibit 9, R., pp. 106 and 107).

The surety proceeded to complete the work. Certain payments of the 12½% specified in the Windsor contract were paid by the surety to respondents. In the course of the completion of the work the surety actually expended for labor, supplies and miscellaneous items which were incident to and necessary for the completion of the work a sum in excess of the amount actually paid by the state for the entire contract. The surety's deficit exceeds the amount of the penalty of the Windsor bond.

This action was brought by the plaintiff to recover the unpaid balance of the 12½% claimed by the plaintiff to be due under the Windsor contract (R., p. 5), certain overpayments made by the respondents to Windsor (R., p. 4), and certain amounts for premiums that had been assessed by the state against respondents for workmen's compensation insurance (R., p. 7).

In the course of the trial the court received over the objection of the respondents evidence as to the amounts paid by the surety in connection with the completion of the work and as to the necessity for

the payment thereof. This was offered pursuant to the terms of the Montana statute authorizing the giving of evidence by an auditor. The trial court in its memorandum decision apparently refused to consider this evidence on the theory that there was no proper foundation laid for it (see memorandum decision of the trial court).

It is the contention of the appellant that respondents cannot recover in this action because appellant has already expended in connection with the construction of the project, a sum in excess of the penalty of its bond.

A consideration of this question necessarily involves a consideration of the appellant's contention that the court erred in refusing to consider certain evidence introduced by the appellant concerning the payment of certain amounts for labor and material. These errors are hereinafter particularly stated in the next subdivision of this brief.

SPECIFICATION OF ERRORS.

1. The court erred in granting plaintiffs' motion for judgment in its favor.

2. The court erred in finding generally in favor of the plaintiff.

3. The court erred in concluding that defendant was not entitled to judgment.

4. The court erred in ordering and directing entry of such judgment.

5. The court erred in entering judgment herein in favor of the plaintiff.

6. The court erred in failing to make findings in favor of the defendant and in failing to direct the entry of judgment and in failing to enter judgment in favor of the defendant herein.

7. The court erred in refusing to order judgment for the defendant at the conclusion of plaintiffs' case.

8. The court erred in refusing to enter judgment for the defendant at the close of the plaintiffs' case.

9. The decision of the court herein is not supported by the evidence and is contrary to law.

The foregoing assignments of error will be relied upon by the appellant to present to this court for its determination the following questions:

a. The appellant, having expended more than the contract price received by Windsor under his contract with appellees, can the appellees recover the twelve and one-half per cent of the contract price?

b. The appellant, having expended more than the penalty of its bond in completing the work, can the appellees recover anything in excess of the amount of the penalty of the bond?

10. The court erred in sustaining plaintiffs' objection to the introduction of the testimony of defendant's witnesses with reference to the amount and the reasonable value of the amount expended by the defendant in completing the project, the substance of said evidence being as follows:

> D. A. Crichton.—I had charge of the completion of the project for the defendant. I made payment by checks for necessary labor or material. Payments were largely made on orders

issued by someone in charge of the camp. The orders were sent to a bank. Then they notified me and I would pay the amount of these orders. I issued approximately one thousand checks and there were approximately two thousand orders issued. Some checks were given in payment for camp supplies. I usually paid the merchant direct for these. In October, 1925, I acquainted myself with the prevailing prices in the vicinity of this particular job for the particular kind of labor, material, supplies, equipment and rental for equipment required on the job. In every instance I paid the prevailing prices. By prevailing prices I mean the market price at which the materials and supplies were obtained. We got the best price obtainable. These prices were the reasonable prices for these various items. I knew and was acquainted with the prevailing and market prices for labor, materials, supplies and rental and knew what these prices were on October 23, 1925, and after that time during the construction of the work.

As far as I know, everything that was purchased went into that job. All of the labor which was hired, all the supplies, materials, parts, which were delivered, for which I issued checks in payment, were utilized on the job.

I assisted Mr. Toole in making an audit of my books, checks and orders. Checks, consisting of Exhibits 49 to 63, inclusive, were paid by me for the Federal Surety Company.

Mr. Toole.—I have been a civil engineer since

1914. I have had experience in making audits. I have audited a number of contracts. I have been in the State Highway Commission. I have made audits of books of account in connection with my work with the State Highway Commission or other contractors or other companies. I have checked miscellaneous data with reference to this particular kind of job. My experience has extended over a period of five years. During the last three years particularly, my work has been on these trouble cases.

I made an audit of the books and records of D. A. Crichton and of the Federal Surety Company to ascertain the expenditures and disbursements on this job. This audit covered a period of time after October 24, 1925. I went into all of their records, receipts and disbursements. I have computed in that audit the amounts that were expended by the Federal Surety Company for labor and material, which was paid for after October 24, 1925. I have that audit and those deductions with me. In making the audit it was necessary to include over one thousand checks and work orders exceeding that number. I am able from the audit to segregate the items labor and services. I have computed these items to be $38,583.77.

Exhibit No. 49 is a bundle of checks issued on the job in payment of labor and services from which my audit covering these items was made. My audit shows that the total amount paid by the Federal Surety Company for supplies was

the sum of $19,945.76. Defendant's Exhibit 50 are the checks and orders covering the purchase and payment of this item of supplies used on the Windsor work.

My audit shows defendant paid $1,423.77 for materials on this job. The checks showing payment are in Defendant's Exhibit No. 51.

My audit shows the defendant paid for repairs on this job the sum of $3,487.87. Defendant's Exhibit No. 52 is the bundle of checks covering this item from which I made my audit.

My audit shows that the defendant paid $7,131.34 for hauling. The checks from which I made this audit is Defendant's Exhibit No. 53.

My audit shows payments by the defendant for tools and equipment in the sum of $3,529.08. The checks in payment of this item are Exhibit No. 54. These tools and equipment were used in this work.

My audit shows that the defendant paid for freight and express $184.18. The checks in payment are Defendant's Exhibit No. 55.

My audit shows that the defendant expended $653.24 for insurance paid and Defendant's Exhibit No. 56 contains the checks which were issued in payment for this item.

The audit shows that defendant expended $140.00 for traveling expenses. Defendant's Exhibit No. 57 contains the checks issued in payment of this item. These traveling expenses were for traveling to and from the Windsor work.

The audit shows that defendant expended $719.07 for expenses for Thomas Cline, who is an engineer of the Federal Surety Company and who was on the job for a part of the time. Checks, drafts and vouchers in payment of this item are contained in Defendant's Exhibit No. 58. Cline was on the work after October 24, 1925.

My audit shows payment by the defendant of $310.96 for expenses of F. M. Toole. Toole was on the job in July, 1926. He was an engineer for the Federal Surety Company. He went there for the purpose of organizing the work and inspecting its progress. Defendant's Exhibit No. 59 contains the drafts in payment of traveling expenses of Mr. Toole.

My audit shows the defendant paid $127.92 for telephone and telegrams. The checks in payment are contained in Defendant's Exhibit No. 60.

My audit shows that the defendant paid $90.72 for board for laborers. Checks in payment are contained in Defendant's Exhibit No. 61.

My audit shows that defendant paid to employment agents. Checks in payment are contained in Defendant's Exhibit No. 62. These checks were given to an employment agency for fare advanced for a ticket for a laborer.

My audit shows that the defendant paid $198.39 for miscellaneous items. These checks are contained in Defendant's Exhibit No. 63.

I procured all of these checks and these exhibits from the home office of the Federal Surety Company, some of the records in the office of D. A. Crichton and others from the records kept on the job.

The insurance item covers insurance for public liability and workmen's compensation. Insurance was carried on trucks that were used on the job and generally insurance against accidents that might happen to the general public.

11. The court erred in sustaining plaintiff's objection to the introduction of certain testimony of the defendants with reference to the necessity of amounts expended by defendant in completing the project, the substance of said evidence being as follows:

Mr. Crichton.—I supervised the job by going up there every two weeks. I inspected the job whenever I went there, conferred with the engineer, Highway Department and foreman in charge of the work. I ascertained what was needed on the job in the way of labor, materials, supplies, parts and rentals. During the progress of the work I looked over the work and looked over the supplies and materials and so on to determine for myself what was necessary in the way of labor, materials, supplies, equipment and parts. I observed and made an examination to determine what was necessary. I went to Browning on an average of once every two weeks. I would go over the job from one

end to the other to see who was working and what remained to be done and what provisions were being made to get the work finished, inspecting it as thoroughly as I could. I made an examination of the supplies and materials. Practically all of the material was purchased by Mr. Windsor or Mr. Powers, but it was not paid for by them. We had to pay for a lot of material they had purchased. That material went into the job. In a general way I would make an examination of these trips to determine whether camp supplies had been delivered. We instructed the foreman to buy necessary supplies and to be sure they got there. When the bills came in and before they were paid the foreman checked the bills. Then checks were issued in payment. In a general way I observed that these supplies were getting to the job. I feel quite certain that everything that was purchased went into that job. I observed whether or not the equipment and number of men were on the job were necessary. From my observation all the labor that was hired, all the supplies, materials, parts and rentals, which were delivered and for which I issued checks, were necessary for this job.

If this court should be of the opinion that the testimony offered under assignments of error numbered 10 and 11 should have been received, there is but one question left for this court's determination, namely, the appellant having expended more than the pen-

alty of its bond in completing the work, can the respondents recover in this action a sum in excess of the penalty of the bond? For the purpose of brevity, we are treating assignments of error numbered 10 and 11 hereinafter in our argument in connection with the foregoing general question.

ARGUMENT.

I. The Appellant Having Expended More Than the Penalty of its Bond in Completing the Work, Respondents Cannot Recover in This Action.

In the course of the trial the appellant produced certain testimony and introduced in evidence certain exhibits showing the amounts expended by the appellant in connection with the construction of the work, the necessity therefor and the reasonable value thereof.

In the trial court's memorandum decision a statement was made by the court that it did not consider this testimony admissible, that no proper foundation had been made, all in connection with appellant's counter-claim. No mention was made by the trial court in its decision as to whether or not this testimony was admissible in connection with the defenses alleged by the appellant.

This evidence was material, not only in connection with appellant's counter-claim, but also in connection with appellant's defense that respondent had expended more than the penal sum of its bond in completing the contract.

We are treating, therefore, the sufficiency of the foundation for the introduction of this testimony and these exhibits hereinafter under this general division of this brief under a separate subdivision.

It is the appellant's contention that the appellant having expended more than the amount named in its bond in connection with the completion of the work, and the expenditure of this amount having inured to the benefit of the respondents, that they cannot recover in this action. To substantiate this contention it will be necessary to consider the testimony quoted under assignments of error numbered 10 and 11.

As will hereinafter be seen, the Montana statute in force at the time of the trial of this action authorized the reception of this evidence.

On or about October 24, 1925, the appellant, after conferring with respondents, took over the completion of the work. They did this after making an agreement with respondents that by so doing it would be without prejudice to assert any of their rights (see decision of the court, Plaintiff's Exhibit No. 8, R., pp. 104, 105; Plaintiff's Exhibit No. 9, R., pp. 106, 107). Prior to appellant's taking over the work, after Windsor had ceased work, respondents refused to complete the project except as agent for the Federal Surety Company (R., pp. 99, 100, 101).

The surety by reason of the execution of the first bond to the Highway Department was obligated to complete the respondents' contract with the state, and this irrespective of the bond delivered by it to the respondents. The respondents, therefore, hav-

ing refused to go on with the work, except for the Surety Company, the appellant was forced to act. Approximately ten days remained to complete the work within the time specified in the original contract. It, therefore, exercised its option and took over the completion of the contract. It is undisputed that the work was afterwards completed by the appellant.

A. *In connection with the construction of the work the surety expended, in addition to the amounts received from the Highway Department, a sum in excess of the penalty of its bond.*

The Highway Department paid to respondents before the surety took over the work the sum of $18,540.92 (R., p. 146). Subsequent to appellant's taking over the work the Highway Department paid to the Federal Surety Company the total sum of $37,700.27 (R., p. 146). In addition to these amounts so paid the Highway Department delivered to the clerk of the District Court for Lewis and Clark county the sum of $9,463.85. This amount was paid to the clerk in an interpleader suit, a number of claimants for material and supplies furnished and labor performed asserting claim to this fund (R., p. 152). The state deducted $1,200.00 for additional engineering expenses (R., p. 148).

Conceding for the purpose of argument that the claims as filed in the interpleader suit are not valid claims against this fund, and that the surety will ultimately receive the $9,463.85 deposited with the clerk of the District Court in the interpleader suit,

the total amount received or to be received by the surety is the sum of $47,164.12.

B. *Amount expended by surety to complete work.*
(Assignment of Errors X and XI.)

The testimony of D. A. Crichton, a witness for the defendant, stands uncontradicted as to the manner in which payment for labor, material and supplies was made (R., pp. 234-244, 280). This witness had charge of the construction work for the appellant. Payment for the necessary labor or materials on the job was made by him from his office in Great Falls. He actually issued the checks. The orders for payment of labor or material would be sent to a bank in Great Falls and Crichton would issue the checks. Approximately two thousand checks were issued. He had acquainted himself with the prevailing prices for the different kinds of labor, material, supplies, equipment and rental of equipment, and the prices that he paid were the prevailing prices for these items. All of the items so paid were necessary for the completion of the work. He went to the job from time to time and conferred with the Highway Department, the engineer on the job, the foreman in charge of the work and ascertained what was needed on the job in the way of labor, material, supplies, parts, rentals, etc. He determined from time to time from looking over the supplies and materials what was necessary in the way of labor, material, supplies, equipment and parts. All the items for which checks were issued were necessary for the work (R., pp. 234-244). Afterwards this same witness assisted

Mr. Toole in making an audit of these checks. This witness testified that at the time the audit was made he examined the various checks that were involved in the audit.

"Q. You assisted Mr. Toole in making this audit?

A. Yes, sir.

Q. And at the time the audit was made, you went over the various checks that were involved in the audit?

A. Yes, sir.

Q. Did you see some checks presented here this afternoon being Exhibits 49 to 63, inclusive.

A. Yes, sir.

Q. Were those checks paid by the Federal Surety Company?

A. Yes, sir.

Q. And by you?

A. Yes, sir.

Q. And charged to the Federal Surety Company when you paid them yourself?

A. Yes, sir.

Mr. Hurd: I want my line of objection to go to all of this testimony.

The Court: Oh, yes, that is understood. That all of this testimony goes in under your general objection" (R., p. 280).

Mr. S. M. Toole, a witness for the defendant, testified that he made an audit of the books and records of D. A. Crichton to arrive at a balance of correct deductions for expenditures and disbursements (R.,

p. 256). He produced the checks that were signed by D. A. Crichton and these were offered and received in evidence subject to the objection of respondents (R., pp. 256-271). Checks which were paid for the various items on the job were received in evidence as Exhibits Numbered 49 to 63, inclusive (R., pp. 260-271). D. A. Crichton testified that these checks signed by him were paid by the Federal Surety Company and by the witness and were charged to the Federal Surety Company when he himself paid the checks (R., p. 280). The actual amount of expenditures made by the appellant in connection with the completion of the contract as shown by these checks and this audit was the sum of $76,531.87, made up of the following items:

Labor and Services	$38,583.77	(R., p. 260)
Supplies	19,945.76	(R., p. 261)
Materials	1,423.77	(R., p. 262)
Repairs	3,487.87	(R., p. 262)
Hauling	7,131.34	(R., p. 263)
Tools and Equipment	3,529.98	(R., p. 264)
Freight and Express	184.18	(R., p. 264)
Insurance	653.24	(R., p. 265)
Travel Expense	140.00	(R., p. 266)
Thomas Cline	719.07	(R., p. 267)
F. M. Thul	310.96	(R., p. 268)
Telephone and Telegraph	127.92	(R., p. 268)
Board for Laborers	90.72	(R., p. 269)
Employment Agency	5.80	(R., p. 270)
Miscellaneous Items	198.39	(R., p. 271)
	76,531.87	

Conceding for the purpose of argument that the surety will receive the $9,463.85 which has been deposited by the Highway Department with the clerk of the District Court for Louis and Clark county, the deficit of the surety to date exceeds the penalty of the bond. The account of the surety on the job at present stands as follows:

Amount actually expended by the surety in connection with the completion of the work (R., pp. 260 to 271)		$76,531.87
Amount received by the surety from the state of Montana (R., p. 146) ...	$37,700.27	
Amount surety may receive from the clerk of the District Court involved in the interpleader suit (R., p. 152)	9,463.85	47,164.12
Deficit of surety.....		$29,367.75

The deficit of the surety, therefore, at the present time is the sum of $29,367.75, an amount in excess of the penalty of its bond. If the District Court for Louis and Clark county ultimately holds that the claimants to this fund have a prior right to it, the surety's loss will be increased by the amount allowed to claimants by the District Court of Louis and Clark county.

The penalty of the surety's bond was the sum of $28,500.00 (R., p. 88).

C. *The liability of the surety cannot exceed the penalty of its bond.*

The amount expended by the surety in connection with the completion of the work necessarily inured to the benefit of the respondents. If the surety had not expended this amount, it would have been necessary for the respondents under their contract and bond delivered to the state of Montana to expend this amount in completing the project. The surety, being obligated under its bond delivered to the state of Montana, was obliged to complete the work, and the amounts expended by it were expended for the benefit of the respondents.

It is elementary that the liability of the surety cannot be increased beyond the plain unambiguous terms of its bond.

See *Babcock v. Wilcox & American Surety Co.* (C. C. A., 8th Cir.), 236 Fed. 340.

U. S. v. Mace (C. C. A., 8th Cir.), 281 Fed. 635.

D. *Under the Montana statute an auditor may testify concerning deductions made from an audit.*

As hereinbefore appears, appellant's witness, Crichton, testified concerning the manner in which payments were made, the necessity for the payments, and concerning the reasonable value of the items as paid. He also testified that he assisted Thul in making the audit and in making this audit the actual

checks which were issued in payment by him were considered. The deductions given by the auditor were made from the actual checks produced in court and introduced in evidence (R., pp. 260 to 271). There is no testimony contradicting the testimony of the witnesses Crichton and Thul that these checks were actually issued. The checks themselves are in evidence (R., pp. 260 to 271).

At the time of the trial of this case there was in force and effect in the state of Montana a statute known as Subdivision 5 of Section 10516, Revised Code of Montana of 1921, which was as follows:

> "There can be no evidence of the contents of a writing other than the writing itself except in the following cases * * * (5) Where the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole."

The testimony concerning deductions made from the audit related to a number of checks. The checks examined in order to arrive at this deduction were in excess of a thousand.

> "Q. Approximately how many checks?
>
> A. I would say something over a thousand checks" (R., p. 258).

The evidence introduced conformed with the requirements of the above quoted section of the statute. The original records consisted of numerous ac-

counts or other documents, there being over a thousand checks. They could not be examined in court without great loss of time, and the evidence sought from them was only the general result of the whole, *i. e.*, the actual amounts expended.

The Supreme Court of the state of Montana has had occasion to interpret this statute, and under the rule announced by that court the evidence offered and received in this case was admissible.

In the case of *Silver v. Eakins* (Montana), 175 Pac. 876, a cashier of a bank was called to testify concerning the status of an individual account. The court held that a copy of the original record was not admissible, but that the witness could testify concerning the general results, the balance deducible from computation. In its opinion, that court stated:

> "In so far as it was sought to show the general result merely—for instance, the balance deducible from computation—the witness was properly permitted to state what was shown by the ledger (Subdivision 5, Par. 7872), but the copies themselves were not admissible."

Section 1855, California Civil Code of Procedure of 1920, contains a provision which is identical with the Montana statute above quoted. This provision of the Montana code was adopted from the state of Montana. The Supreme Court of the state of Montana has uniformly held that it will adopt the construction put upon a particular portion of its code by the courts of the state from which the particular portion of its code was adopted.

See *Continental Oil Co. v. Montana Concrete Co.*, 62 Montana 223.
Stackpole v. Hallihan, 16 Montana 40.
Stadler v. First National Bank, 22 Montana 190.
Largey v. Chapman, 18 Montana 563.
McKeever, et al., v. Oregon Mortgage Co. (Montana), 198 Pac. 752.

The courts of California in construing their statute which is identical with the Montana statute, have uniformly held that where the audit was made from various documents by going over these documents and checking them with the original bills which were retained and which one of the parties knew had been paid, the deductions made from the audit were admissible in evidence.

In the case of *Globe Manufacturing Co. v. Harvey* (Cal.), 196 Pac. 261, the action was for breach of a manufacturing contract. The defendant's statement or summary of expenditures was admitted under the Code of Civil Procedure of California, Par. 1855, Subdivision 5, because the originals consisted of numerous accounts which could not be examined without great loss of time. This audit was made from original bills of the payment of which defendant had personal knowledge. This evidence was admissible and it was not necessary for the bookkeeper to testify concerning the correctness of the items, the defendant having had personal knowledge of the payment of the various items. In this decision the Supreme Court of Montana stated:

"Plaintiff assigns this as error for the reason

that the person who kept defendant's books did not testify to their correctness. The statement, or summary, was admitted under Subdivision 5 of Section 1855 of the Code of Civil Procedure, because the original consisted of 'numerous accounts or other documents, which cannot be examined in court without great loss of time.' Defendant maintains a card system of bookkeeping, and testified that he personally made up the statement in question by going over the cards and checking up the entries thereon with the original bills, which he retained and which he knew had been paid. Therefore the statement was, in fact, made from the original bills, of the payment of which defendant had personal knowledge, and defendant was competent to testify to the correctness of the items thereof upon his own knowledge, which he did. For this reason, testimony by the bookkeeper as to the correctness of the books of defendant was unnecessary and the statement was properly received in evidence."

In the case of *McPherson v. Great Western Milling Co.* (Cal.), 186 Pac. 803, the action was brought to recover half of the profits of the corporation. A witness, an auditor, testified concerning deductions made from an audit. An objection was made that the witness who was simply an auditor and not the accountant of defendant's business had not shown that the records on which the deduction was based was correct. The court held that there was no con-

tention that the statement was not correct as a summary of the books showed, that the party objecting had it in its power to show any error in the records in the trial court, the documents from which the audit was made being in court although not offered. The court held that the evidence was properly admitted. In its opinion the court stated:

> "The business was carried on under the name of the Orange County Supply Company, the books of which were in the possession of the appellant, and in court counsel for the appellant twice said he would offer them in evidence, but the formal offer was not made. The witness testified he had made the statement from the books. The ledger being shown him, he was asked if that was the book from which he got the data. He replied:
>
> 'I couldn't say. *The only way I could tell is by comparing the figures of the statement I made with the ledger.* I don't now recall whether this is the book or not.'
>
> He was not asked, nor afforded the opportunity to make the comparison. The specific objection to the statement was that the witness, who was simply an auditor, not the accountant, of the defendant's business, had not shown that the records on which the data was based were correct. There is no contention that the statement was not correct as a summary of what the books showed, nor that they were not correct. The appellant had it in its power to show any error in either in the trial court. The case was

one permitting the use of just such a summary as was introduced. Code Civ. Proc., Sec. 1855, Subd. 5."

In the instant case not only were the checks from which the audit was made in court, but they were actually introduced in evidence (R., pp. 260 to 271). The witness, Crichton, had testified that from his own personal knowledge he actually paid these checks, or the Federal Surety Company had paid them. There was no objection made as to the accuracy or correctness of the deductions. The evidence offered and received, we submit, was properly admissible under the section of the Montana statute.

Respondents attempted to introduce certain evidence concerning the reasonable value of doing the work if the work had been sublet by the surety to some sub-contractor (R., p. 298). The surety, under the facts that existed at the time it took over the work, in view of the refusal of the respondents to take over the work, was not obligated to sublet the work. The respondents acquiesced in the surety completing the project. They made no objection to appellant finishing it.

This witness in attempting to give his deductions as to the reasonable value of finishing the work did so by making his deductions from the estimates and assuming that the amount of work shown by the particular estimate had actually been completed. The same witness admitted that at least as to some of the work he had heard that it was not completed at the time the surety took over the work although pay-

ment had been allowed theretofore in an estimate.

"Q. Now, you said on your direct examination that you based your conclusion as to the amount of work remaining to be done on the estimates which you had in your possession?

A. Yes, sir.

Q. And based, that, assuming the fact to be that all the work which was shown by those estimates to have been paid for by those estimates, that is, from one to five or six, that all that work had actually been done prior to the Federal Surety Company taking over the work, did you not?

A. Yes, sir.

Q. You said that all of that work had been done, didn't you, on direct examination?

A. According to the estimates.

Q. But you know as a matter of fact that all that work as shown by those estimates had not been done on October 24, 1925, by Windsor, don't you, Mr. Powers?

A. I don't.

Q. Do you know about the culverts at station one hundred and three plus sixty-seven?

A. I couldn't say without looking at the profile.

Q. Of your own knowledge you know that the station at one hundred and three plus sixty-seven was not finished by Windsor at the time estimate number five and estimate number six were delivered?

A. I don't know of my own personal knowl-

edge. I have been told so" (R., pp. 302 and 303).

"Q. In making the deductions about which you testified a few moments ago, you said you relied on all these estimates, and computed the deductions from all the estimates, from one to twelve inclusive?

A. Yes, sir.

Q. Now, have you those estimates here?

A. I said that the estimates were cumulative, and that I had estimate six and estimate twelve.

Q. And you just made your deductions from both of these estimates?

A. (No response.)

Q. Do you know what the fact is as to whether or not estimate six shows payment up to ninety per cent of the full contract price, as the original contract price, estimate number six for all yardage, for excavation north of Kennedy Creek?

A. I do not.

Q. Giving the deductions of the reasonable value of doing the work, about which you testified, you based it solely upon the estimate number six and estimate number twelve, and the difference is shown by those estimates?

A. In arriving at the quantity?

Q. Yes.

A. I did.

Q. And you don't know whether the quantity is shown by estimate number six as having been removed or correct or not?

A. No, they were correct I assumed.

Q. And that would be true also to the item of clearing?

A. Item of clearing?

Q. Item of clearing. You based that upon the estimate also?

A. Yes, I have got personal knowledge of clearing.

Q. Would you say that all the clearing which was shown by estimate number six as having been done up to that time was actually done on October 24th, when the Federal Surety Company took over this work?

A. Practically so.

Q. What do you mean by 'Practically so'?

A. Well, there may have been some brush to burn, and a little clearing to do, but the clearing was practically done.

Q. There was not an acre of clearing to be done, or burning to be done?

A. Oh, there might have been an acre, not over that, not grubbing, but clearing, burning the brush.

Mr. Melrin: Now, your Honor, at this time, we move to strike out all the testimony of this witness with reference to the reasonable value of doing this work, on the ground that it is incompetent, irrelevant and immaterial, and the witness has shown that he is not qualified to give an opinion as to value, not being famiilar with the conditions which existed at or near this project during the time the work was done;

the witness having stated that the weather conditions, and other conditions would have entered into it, and having admitted he was not there, he would not know what the conditions were" (R., pp. 303 to 305).

The witness was not near the work from the time it was taken over by the surety until it was completed (R., p. 297).

"Q. You were not near this work from October 24, 1925, until after its completion, were you?

A. I have not been near the work since September, 1925, to the present time."

The witness admitted that he did not know what the condition of the weather was at the location of the work from the time the surety took over the work until it was finished.

"Q. You don't know what the condition of the weather was, from October, 1925, until the date of completion, do you, at that place?

A. The condition of the weather?

Q. Yes.

A. From what time?

Q. From October, 1925, up to the date of completion, you never observed the weather there yourself?

A. No, I did not" (R., p. 297).

The witness admitted that weather conditions would affect the cost of doing the work if the work was not sublet.

"Q. You were not at Browning during that time, were you?

A. I didn't—I don't think I was through Browning, no.

Q. And the price for doing that character of work about which you have testified depends to a great extent upon the condition of the weather, does it not?

A. That depends upon whether you do the work yourself, or whether you sublet it.

Q. If you do the work yourself, it depends to a great extent as to the weather conditions?

A. It does. If you sublet you are not interested in the weather factor.

Q. If you do the work yourself, if you have rain or snow, it will alter materially the cost of the work, will it not?

A. It will" (R., p. 298).

The lower end of the project was about thirty-five to forty miles from a railway station (R., p. 298). The witness admitted that weather conditions taken into consideration this distance from a railway station would make a difference in computing the reasonable value of doing the work if the work was not sublet.

"Q. That is not my question. Wouldn't weather conditions, taking into consideration the fact that you were thirty-five miles from a railroad, your camp was, wouldn't those two factors taken into consideration make some difference in the computation of the reasonable

price at which work of this kind could be done?

A. Yes, the fact that you were thirty-five miles from a railroad, or from the American Railroad would be a factor.

Q. Yes, if you had any particularly bad weather there, and it was necessary to do your hauling from a railroad station over roads of the kind leading from the town to the railway station, to where the railway station is located, and from the railway station to the camp, it would make some great factor in the cause, would it not?

A. Yes, sir.

Q. Particularly in the spring of the year?

A. It would.

Q. And during the time that there would be snow on the ground?

A. During the time that there would be snow?

Q. Yes.

A. If there was snow on the ground it would be a factor."

The witness testified that the road leading from the railway station to the work would get in bad shape in case of rain.

"Q. Browning was the closest railway point at that time, where you had a road?

A. The road either way was just about the same.

Q. Just a trail?

A. Just a trail.

Q. And the road from the lower portion of this work to Browning was in what condition, in October, 1925?

A. Well, there were two roads; one was through the park, and one was down over the reservation.

Q. Could you haul materials through the park?

A. Yes.

Q. And what was the condition of that road?

A. That road is pretty good.

Q. Was it pretty good when you went outside the park itself?

A. Yes, up to Babb, it was.

Q. In case of rain there, that road would get in pretty bad shape, would it not?

A. Yes, at times" (R., p. 301).

At the time the surety took over the work, respondents admitted that a number of bills had been left unpaid on the job by Windsor.

"Q. Now, do you know at the time Windsor stopped work in October, how many bills had left unpaid on this job?

A. No, except from the bills, or statement of the bills that he presented.

Q. And do you know approximately how much those bills were?

A. I don't recall.

Q. They amounted to several thousand dollars, did they not?

A. I think they did" (R., p. 301).

Some of the labor and material bills were paid on that date.

"Q. What, if anything, did you do with reference to making payments for labor and materials on that day?

A. Well, we arranged to take care of them at once.

Q. Did you make any payments on that day?

A. Yes, sir.

Q. How much did you advance?

A. I don't recall now. We put the bills down, and at that time I had no money from the Federal, so I paid the labor with all I had myself, and asked Mr. Powers to advance me a little to pay off the remainder until such time as I either got the estimate from the state or money from the Federal to go ahead and make up the payments.

Q. And what did you do subsequently with reference to repaying Mr. Powers for the money so advanced on that day?

A. Shortly thereafter I sent him a check for what he had coming, for what he had advanced me.

Q. The amount that he had advanced you at Browning?

A. Yes, sir.

Witness: (Continuing.) That money that I paid out went to pay all labor that was furnished or performed on this particular job, on the so-called labor contract for the Babb-Carsdon road" (R., pp. 232 and 233).

All payments made by the surety company for labor and material or supplies necessarily inured to the benefit of the respondents since the respondents were liable therefor in view of their contract and bond which had been delivered to the state of Montana.

CONCLUSION.

At the time the appellant took over the work it was forced to take over and complete the project because of the execution and delivery to the state of Montana of its first bond. The respondents had refused to complete the work except as agents for the Federal Surety Company. The surety was not obliged to sublet the work but had the right to supervise and complete it. The payments that were made by the surety in connection with the claims which had already been incurred by Windsor inured to the benefit of the respondents, this in view of their contract and bond delivered to the state of Montana. The payments made by the surety after it took over the work for various items in connection with the work were necessary for the completion of the work. The amounts paid by the surety for the various items were the reasonable value of those items. Crichton, the agent of the surety company, for the completion of the work had personal knowledge of the payment of these items. The checks actually introduced in evidence were identical with the deductions made by the auditor. There was no attempt made to question the accuracy of the deductions as shown by the checks themselves. Crichton having testified to the

payments as of his own personal knowledge, the auditor was qualified to give his deductions. The amount actually received by the surety from the Highway Department amounted to the sum of $37,700.27. The amount delivered by the Highway Department to the clerk of the District Court in the interpleader suit amounted to $9,463.85. Giving the respondents the benefit of this $9,463.85 so deposited with the clerk of the District Court in the interpleader suit, the deficit of the surety at the present time exceeds the penalty of its bond. As a matter of fact if the Montana District Court in the interpleader suit holds that the claimants are entitled to the money deposited with the clerk of the District Court in the interpleader suit, the loss of the surety company will be increased by the amount deposited with the clerk of court.

We submit that a judgment should have been rendered for the surety company, and that it was error for the trial court to enter judgment for the respondents.

Respectfully submitted,

WARE & MELRIN,
JOHN R. WARE,
L. E. MELRIN,
1150 Baker Building,
Minneapolis, Minnesota,
O. B. KOTZ,
402 Ford Building,
Great Falls, Montana,
Attorneys for Appellant.

No. 5618

United States Circuit Court of Appeals For the Ninth Circuit

FEDERAL SURETY COMPANY, a corporation,
Appellant,

vs.

ALBERT LALONDE, R. E. PECK and
WILLIAM POWERS, Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Montana.

HURD, HALL & McCABE,
H. C. HALL,
E. J. McCABE,
Attorneys for Appellees,
Great Falls, Montana.

SUBJECT INDEX

Page

Statement of Case 2
Object of Action 13
Argument 13
1. The appellant having expended more than the penalty of its bond in completing the work, Respondents cannot recover 14
2. Was any competent evidence introduced showing the expenditure of any sum by appellant 18
3. Conclusion 24

TABLE OF CASES

Page

American B. Co. v. Regents, 81 Pac. 604 15
American Law Reports, Vol. 12, p. 382 14
Ausplund v. Aetna Indemnity Co., 81 Pac. 577 ..... 15, 18
Bank v. Fuqua, 11 Mont. 285 14
Berne v. Stevens, 67 Mont. 254 17
Blankenship v. Decker, 34 Mont. 292 ..... 14, 16
Butte Water Co. v. Butte, 48 Mont. 386 17
California Jurisprudence, Vol. 6, p. 304 17
Vol. 6, p. 60 17
Capital Finance Corp. v. Metropolitan Ins. Co. 243 Pac. 1061 14
Corpus Juris, Vol. 9, p. 36 16
Vol. 13, p. 590 15
Vol. 22, p. 564 23
Vol. 22, p. 728 23
Vol. 22, p. 864 21
Vol. 22, p. 1017 22
Farmers State Bank v. Probst, 263 Pac. 693 16
Ferry & Co. v. Forquer, 61 Mont. 336 17
First Natl. Bank v. District, 110 N. W. 349 15

Page

Francis Bros. v. Boiler Co., 109 Fed. 838 16
Gallatin Alliance v. Flannery, 59 Mont. 534 21
Gary Hay & Grain Co. v. F. & D. Co., 255 Pac. 722 .. 16
Globe Mfg. Co. v. Harvey, 196 Pac. 261 22
Hills v. Johnson, 52 Mont. 65 17
Hughes v. Gibson, 62 Pac. 1037 15
Inman Mfg. Co. v. American Cereal Co.,
110 N. W. 287 16
Knapp v. Andrus, 56 Mont. 37 17
Lincoln County v. Bridge Co., 231 Fed. 468 13
McConnell v. Blackley, 214 Pac. 64 17
McPherson v. Great Western M. Co., 186 Pac. 803 22
Meredith v. Roman, 49 Mont. 204 21
Minder v. Brustuen, 127 N. W. 546 15
Mogulewsky v. Rohrig, 93 N. Y. S. 590 15
Moon v. H. M. Hocker Co., 101 Ill. App. 177 15
Natl. Bank v. Ingle, 53 Mont. 414 17
Natl. Surety Co. v. Lincoln County, 238 Fed. 705 ....14, 16
Pabst Brewing Co. v. Horst Co., 229 Fed. 913 .....21, 22
Phillips v. United States, 201 Fed. 259 21
Price v. Garland, 6 Pac. 472 16
Revised Codes, Mont. 1921, Sec. 10516 21
Rohde v. Biggs, 66 N. W. 331 15
Silver v. Eakins, 55 Mont. 210 21
Solberg v. Sunburst Oil & G. Co., 246 Pac. 168 23
State v. Asal, 256 Pac. 1071 21
State v. American Surety Co., 255 Pac. 1063 13
State v. Cornwall, 201 Pac. 1072 15
State v. Yegen, 74 Mont. 126 21
Stone-Ordean Wells v. Anderson, 212 Pac. 853 17
U. S. F. & G. Co. v. Robert Grace Co., 263 Fed. 283 16
U. S. Natl. Bank v. Chappell, 71 Mont. 553 .....16, 17
Wasley v. Dryden, 66 Mont. 17 21
Watson v. O'Neill, 14 Mont. 197 16
Watterson v. Owens Canal Co., 143 Pac. 90 15
Weir v. Ryan, 68 Mont. 336 14
Whittaker v. U. S. F. & G. Co., 300 Fed. 129 13

No. 5618

United States Circuit Court of Appeals For the Ninth Circuit

FEDERAL SURETY COMPANY, a corporation,
Appellant,

vs.

ALBERT LALONDE, R. E. PECK and
WILLIAM POWERS, Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Montana.

HURD, HALL & McCABE,
H. C. HALL,
E. J. McCABE,
Attorneys for Appellees,
Great Falls, Montana.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL SURETY COMPANY, a corporation,
Appellant,

vs.

ALBERT LALONDE, R. E. PECK and
WILLIAM POWERS,
Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Due to the questions raised by appellant on this appeal we believe it advisable to make a more detailed and extended statement of the case than attempted by appellant. This we deem necessary in order that the court may have before it the exact contract between the parties and their situation at the time of trial.

On September 12, 1924, appellees entered into a contract with the State of Montana, through its Highway Commission, to construct 10.68 miles of public highway, known as the Federal Aid Project No. 208-A, and also as Babb-Cardston Road. The contract (R. pp. 74-79) provided, so far as material here, that appellees would do all the work and furnish all the labor, services and materials in the construction of said road; that the construction work upon said road should be completed in accordance with the provisions of the contract, on or before November 1st, 1925, (R. p. 75) but a method was provided in said contract for granting by the State Highway Commission, an extension of time within which to complete the work (R. p. 76).

Pursuant to Section 1790, R. C. M., 1921, the appellant on the 12th day of September, 1924, and without any written application of appellees therefor, other than a request to write the bond (R. p. 212) executed and delivered to the State of Montana appellant's bond (R. pp. 213-215) in which it obligated itself in the sum of $32,459.27 to insure the performance by the appellees of all of the terms and conditions of the contract.

As authorized by the contract, the appellees on October 27th, 1924, entered into a sub-contract with one C. H. Windsor (R. pp. 80-87) whereby Windsor obligated himself to furnish all tools, machinery, implements, work, labor and materials and to assume all the burdens and obligations of the appellees under the contract, and in payment thereof should receive 87½% of the amounts which appellees were to receive under their contract with the State Highway Commission (R. p. 82), and in the event of default appellees were authorized to take over the work, after notice, and complete it and account to Windsor, but, nevertheless should have their 12½% of the amount earned under the contract (R. pp. 84, 85).

It was further provided that Windsor would comply with the Workmen's Compensation Act of the State of Montana (R. p. 85) and that appellees might advance money from time to time which should be deducted out of the earnings of Windsor under his sub-contract (R. p. 82).

This contract was consented to by the State Highway Commission, by its endorsement thereon. For the faithful discharge of the duties of Windsor, the appellant, on October 27th, 1924, executed and delivered to the appellees, its bond in the sum of $28,500.00 (R. pp. 88-92),

and executed by the Federal Surety Company by D. A. Crichton, its attorney in fact (R. p. 92). For premium upon this bond appellant received $852.05 (R. p. 221) of which amount the appellees obligated themselves to pay one-half or $426.02 in their sub-contract with Windsor (R. p. 86). *This is the bond in suit.*

In addition to the premium received by it, the appellant to indemnify itself against loss, received from Windsor a transfer of all of the right, title and interest in and to all tools, equipment and all materials which might be purchased during the process of construction, whether in storage or transportation, and authorized the agent of the appellant to take possession thereof to enforce the security (R. p. 223), and also Windsor agreed that appellant should be subrogated to all of the rights, privileges and properties as of October 27th, 1924, and to all moneys reserved, and that the property and proceeds thereof and all moneys reserved, should be the sole property of the appellant (R. p. 224).

The appellant interpreted the bond, as appears throughout the record, not necessary here to specify, to obligate it for the performance of the Windsor sub-contract.

The bond further provided that in case of default on the part of Windsor, a written statement of facts shall be delivered by registered mail to the appellant at Davenport, Iowa, and in no event later than ten days after the appellees should become aware of such default, and that appellant *shall have the right, at its option, to proceed with the performance of the contract with Windsor*, and shall thereupon immediately be subrogated to all of the rights of the principal and obligee, and as such contract is performed all sums of money payable to Windsor shall

be paid to the appellant or whomever it may procure to perform the contract (R. p. 89).

Windsor commenced the construction of the road under the terms and conditions of his sub-contract but abandoned work thereon on or about the 20th or 21st day of October, 1925, (R. p. 97).

Pursuant to the contract and sub-contract, estimates of the work done by Windsor were made monthly after the work commenced, estimate No. 1 being for the period ending May 20th, 1925; No. 2 for the period ending June 20th, 1925; No. 3 for the period ending July 20th, 1925; No. 4 for the period ending August 20th, 1925, and No. 5 for the period ending September 20th, 1925, (R. pp. 144, 145).

According to these estimates, 1 to 5 inclusive, Windsor had earned $20,601.02, out of which the State paid the appellees $18,540.92, and the State retained for appellees under the contract $2,060.10 (R. pp. 144, 145).

Appellees, under the sub-contract, were indebted and prior to October 29th, 1925, had paid Windsor $16,223.31 (R. p. 92), and under the sub-contract had advanced him for labor and materials in the construction of the road the sum of $3,739.10 (R. p. 93).

Estimate No. 6 for the period ending October 20th, 1925, had not been delivered to appellees at the time Windsor abandoned the contract (R. p. 92), but Windsor had earned under such estimate the sum of $2,856.22 (R. p. 145), out of which the State, on November 18th, 1925, paid to the appellant $2,570.60 and retained $285.62.

Thus, Windsor earned under the contract and sub-contract, estimates 1 to 6 inclusive, $23,457.24 (R. pp. 144-145).

On October 20th, 1925, the State Highway Commission notified appellees and Crichton that Windsor had quit, his laborers stranded in Browning, in a critical condition, and stated that appellees and appellant must take immediate action to pay laborers, and prevent repetition of similar occurrence (R. pp. 123, 227). Of this fact the appellees and Crichton, by wire, notified appellant at Davenport, Iowa, (R. pp. 97, 253).

Appellees further advised appellant that Windsor had been advanced all that he had coming and requested the appellant to take steps to protect them under the bond, appellees' exhibit 5, (R. p. 97). Appellees having received no reply from appellant again wired it on October 22nd, 1925, at its home office, requesting a reply to the former message, and also inquired what the appellant was going to do to protect appellees under the Windsor bond (R. p. 98).

On October 23rd, 1925, by night letter, appellant advised appellees that "matter referred to Crichton." By pre-arrangement, appellees Powers and Lalonde met Crichton at Browning, October 23rd, 1925, (R. p. 98). Upon coming into contact with Crichton, *appellees offered to take over the work under the Windsor contract and complete it, reimbursing themselves for the $3,739.10 which they had advanced to Windsor, and release the Federal Surety Company of that obligation*, and requested Crichton to ascertain from Windsor whether they might use the gravel crusher on the project and the two trucks for emergency, for completing the project (R. pp. 00-100). At first Crichton assured appellees that such course would be satisfactory if it were agreeable to Windsor (R. pp. 100-101).

On the morning of the 24th day of October, 1925, Crichton notified appellees that they could not take over the work, *but that he would take it over and complete it for Windsor on the condition that appellees give appellant an agreement to the effect that appellant might receive all the money from the State Highway Commission theretofore earned by Windsor or that thereafter might be earned by the appellant, and that the appellant would pay appellees their 12½% of each estimate as received* (R. p. 101). Crichton advised appellees that he would prepare the agreement for appellees to sign embodying the features of the understanding (R. p. 101).

After the agreement was reached at Browning, on October 24th, 1925, the Federal Surety Company took over the machinery of Windsor's and put a man in charge thereof (R. p. 232). When the Federal Surety Company took over the work Crichton did not claim, and at the trial did not claim that appellees had in any way failed to perform any provisions of the contract (R. p. 125). His only contention was that the Federal Surety Company had been released from the bond on the sub-contract by reason of appellees paying Windsor $3,739.10.

Pursuant to Crichton's agreement with appellees at Browning, and on October 29th, 1925, he forwarded to appellees exhibit 23 (R. p. 130), a form of letter to be signed by them and sent to the Federal Surety Company, such form of letter authorizing the Highway Commission to turn over all money to be due under the Babb-Cardston project. In the letter Crichton inserted—*"It being understood that you, (Federal Surety Company) are to move on to this work and complete same in lieu of Mr. Windsor, who has defaulted,"* and also the clause to the effect

—"that all parties were standing on their rights." On the same day Crichton wrote appellees exhibit 8, advising appellees of the receipt of authority from appellant to take over the job, and stated that it would reimburse appellees for the amount they advanced at Browning as soon as they gave authority to the Highway Commission to pay over the money. Accordingly, appellees wrote their exhibit 9, October 30th, 1925, embodying substantially paragraphs one and two of appellant's exhibit 23, and appellees' appended paragraph three, providing for the payment to appellees of 12½% of all amounts received by the appellant (R. pp. 106-107). The appellees also signed authority to the State Highway Commission to turn over to the Federal Surety Company the moneys mentioned, appellees' exhibit 11, dated October 30th, 1926, which was prepared by Crichton (R. p. 109), and appellees forwarded both of these instruments to their attorneys to be delivered to Crichton.

Exhibit No. 9 was produced in court by appellant and it was stipulated that exhibit 11 had been received in the office of the State Highway Commission (R. p. 108).

The consideration for the change shown by appellees' exhibit 9, (R. p. 106) was the authorization by the appellees to the State Highway Commission to turn over the earnings under estimate No. 6, and all subsequent earnings, to the Federal Surety Company, and to allow them to stand upon the sub-contract and bond thereon, and the promise of the Federal Surety Company to pay appellees 12½% of the amount earned by Windsor under estimate No. 6, and amount to be earned by said Federal Surety Company, in the completion of the work.

As above pointed out, *Crichton understood that the Fed-*

eral Surety Company was taking over the work for Windsor, and embodied such statement not only in the form of letter submitted by him to the appellees, appellant's exhibit 23 (R. p. 130), *but also in the form of letter to the State Highway Commission, appellees' exhibit 11* (R. p. 109).

Thereafter, Crichton stated to Mr. Whipps of the State Highway Commission, and to the Industrial Accident Bureau, that the Federal Surety Company was taking over the work under the sub-contract bond, that is, the Windsor bond (R. pp. 138, 140), and stated to E. J. Dorreen, Resident Engineer on the Babb-Cardston work, that the work had been taken over for Windsor on account of his default (R. p. 144).

Before June 14th, 1926, the Federal Surety Company received from the State of Montana the non-Indian portion of estimate No. 7 (R. p. 145), and before June 28th, 1926, received the Indian portion of estimate No. 7 (R. p. 146).

On June 16th, 1926, appellees' exhibit 17, (R. p. 117) appellees demanded of the Federal Surety Company 12½% out of the May estimate, to which there was no response, and they again under date of June 25th, 1925, exhibit 15, (R. p. 115) demanded of the Federal Surety Company the amount due them on the May estimate, and also the amount due them on the June estimate. On the back of that letter was written Crichton's reply, exhibit 16, (R. p. 116), in which he advises appellees that the Home Office would likely either send their check to Crichton or authorize him to draw for the amount, and states that the amount should reach appellees the coming week. That refers to estimate No. 7, of May 20th, 1926,

and again on June 28th, 1926, exhibit 18, Crichton expected a check from the Home Office for appellees early that week (R. p. 118).

Under date of July 1st, 1926, appellees' exhibit 19, (R. p. 119), Crichton wrote appellees that on that date he had received a telegram from the Federal Surety Company as follows: *"Taylor is emphatic and desires you pay no material bills or Lalonde, Peck and Powers percentage until job completed. Our bond protects Lalonde, Peck & Powers percentage, and we will not pay that until final,"* and Crichton further advised that such telegram stopped him from sending check for their 12½% which he had intended to do. But Crichton also advised appellees in his handwritten letter, undated, exhibit 20, (R. p. 120), *that he had authority from the Federal Surety Company to pay them 12½% on last estimate.* Apparently the word "final" in exhibit 19 had reference to final estimate.

Various demands were made upon appellant for the payment of the amount due without avail (R. pp. 199, 201, 202, 205, 206, 207, 208, 209).

The appellant presented to the State Highway Commission, claims verified by Crichton as General Agent, for estimates Numbered 6 to 11, inclusive, and also presented claim for estimate No. 12, verified by Crichton as State Agent, on November 15, 1926, in which last mentioned claim all of the ten percent retained by the State Highway Commission for the time Windsor was performing the sub-contract, as well as thereafter, was included (R. pp. 157-195).

Except the amount of money paid into the District Court of Lewis and Clark County (R. p. 152), the appellant received all that was earned upon estimate No. 6,

and thereafter, but paid appellees only $321.23, on June 8th, 1925, (R. p. 121).

From the foregoing it is obvious that the change made by the appellant and the appellees, and evidenced by the letter of October 30th, 1925, was, in effect a new contract, between the parties, and that by reason of appellant's direct promise to pay 12½%, the Federal Surety Company became liable for the payment, both under the bond and the contract.

Until the answer was filed in this case, neither the Home Office of the appellant, nor Crichton ever intimated to anybody that the Federal Surety Company took over the work for the appellees. On the contrary, all of Crichton's statements and letters relating to that matter were to the effect that the work had been taken over on account of Windsor's default, and Crichton admitted on the witness stand that appellees were not in default in the performance of the contract at the time the work was taken over.

In support of its counter-claim the appellant offered the testimony of Crichton to the effect that he had supervised the completion of the work; went upon the work about once in every two weeks; received bills for supplies and labor; made checks therefor, and over the objection of appellees, stated that all the labor for which checks were issued, and all the supplies, materials, parts and rentals were necessary on the job (R. pp. 233-238). Without even so much as attempting to identify, by Crichton, the checks and orders used in connection with payments for labor, supplies, materials, etc., the appellant called to the witness stand its Auditor, S. M. Toole, he claiming to have gone over the records of the office of the D. A.

Crichton Company and of the Federal Surety Company, at Davenport, Iowa, and made an audit and then, over the objection of the appellees, was permitted to testify as to what was shown as a total of checks and orders in appellees' exhibits No. 49 to 63, inclusive. Upon these he concluded that the appellant had expended for labor, materials, insurance, employment agent's fees, and whatnots, the sum of about $77,340.81, in the construction of the Babb-Cardston Road, after the appellant took over the work (R. pp. 260-271). No evidence was offered by appellant to show the reasonable value of the labor, materials and supplies which went into the work.

Mr. Toole was not required to furnish the result of his audit, as is contemplated by Section 10516, subdivision 5, R. C. M. 1921, but was requested merely to give totals of various checks and orders, and except in a few instances, had no personal knowledge of the items for which said checks and orders were given.

Appellees' proof (R. pp. 281-296) that the reasonable value of all the labor, services and materials necessary to complete the work after the appellant took it over was the sum of $32,611.91 (R. p. 287), and in part this testimony was based upon what the estimate showed as the amount of yardage, and quantity of materials, etc., used in the work, and the estimates corroborated in every material way the testimony of appellees upon that point (R. pp. 288-296). The appellees further proved, based upon the reasonable value of such labor, services and all other items which went into the construction, the work done by the Federal Surety Company under the sub-contract, including estimate No. 6, and the 10% withheld on the

first six estimates, should reasonably have been $14,263.97 (R. p. 296).

OBJECT OF THE ACTION.

With the above statement of the case in mind, the object of the action here under consideration becomes apparent. Appellees sought to recover the amount of money advanced by appellees to Windsor, to-wit, $3,739.10 (R. p. 93); the 12½% difference to be retained by appellees from all moneys received from the State, to-wit, $6,045.51, less a credit of $321.34 (R. pp. 6, 121); and the sum of $468.33 assessment paid under the requirements of the State Workmen's Compensation Act (R. pp. 7, 111). The basis for the action is the contract between Windsor and appellees, the performance of which was insured by the bond of October 27, 1924, and the subsequent agreement between appellant and appellees evidenced by the correspondence appearing in the record and by the acts of the parties (R. pp. 101, 106). The District Court sustained the theory of appellees and rendered judgment for the full amount demanded, with interest. From that judgment this appeal is taken.

ARGUMENT.

In the presentation of argument on behalf of appellees we shall follow as closely as possible the order used by appellant in its brief.

At the outset it must be borne in mind that the bond here must be construed most strongly against the surety.

Whittaker v. U. S. F. & G. Co., 300 Fed. 129;
Lincoln County v. Bridge Co., 231 Fed. 468;
State v. American Surety Co., (Mont.) 255 Pac. 1063;

Nat. Surety Co. v. Lincoln County, 238 Fed. 705; 12 A. L. R. 382.

All ambiguities must be resolved in favor of appellees;

Blankenship v. Decker, 34 Mont. 292;
Weir v. Ryan, 68 Mont. 336.

The bond must be construed in accordance with the law of Montana.

Capital Finance Corp. v. Metropolitan Ins Co. (Mont.) 243 Pac. 1061;
Bank v. Fuqua, 11 Mont. 285.

1. The Appellant Having Expended More Than the Penalty of Its Bond in Completing the Work, Respondents Cannot Recover in This Action.

In this portion of our brief we shall assume, for the purpose of argument only, that competent evidence was introduced on behalf of appellant showing an expenditure by it in completing the road in excess of the penalty of the bond.

As we have heretofore seen in our analysis of the evidence there never was a claim made that appellees were in default or that they refused to proceed. In appellant's brief the statement is made (p. 14) that:

"Prior to appellant's taking over the work, after Windsor had ceased work, *respondents refused to complete the project except as agent for the Federal Surety Company.*"

There is absolutely no evidence in the record to substantiate such assertion. Respondents *offered* to move their outfit on to the project and complete it for the Federal Surety Company (R. p. 99). They agreed to work out all advances to Windsor (R. p. 99), and to pay to Windsor all profit made on the job (R. p. 100). But

Crichton advised that he "could not turn the work over" to respondents, and that "he would take over the work and complete it for Windsor." (R. p. 101).

That Crichton as general agent for appellant did "take over the work and complete it for Windsor" is not and cannot be controverted here. His actions and letters speak for themselves (R. pp. 101, 104, 109, 130, 138, 141, 144).

By taking over the work for Windsor appellant assumed all the responsibilities of Windsor.

Ausplund v. Aetna Indemnity Co. (Ore.) 81 Pac. 577;
American B. Co. v. Regents, (Ida.) 81 Pac. 604;
Rohde v. Biggs, (Mich.) 66 N. W. 331;
First Natl. Bank v. District, (Nebr.) 110 N. W. 349;
State v. Cornwall, (Ore.) 201 Pac. 1072;
Watterson v. Owens Canal Co., (Cal.) 143 Pac. 90;
Hughes v. Gibson, (Colo.) 62 Pac. 1037.

It was perfectly competent for the parties to agree that appellant might substitute itself for Windsor. In fact they could have substituted a third person.

13 C. J. 590;
Moon v. H. M. Hocker Co., 101 Ill. App. 177;
Mogulewsky v. Rohrig, 93 N. Y. S. 590;
Minder v. Brustuen, (S. D.) 127 N. W. 546.

The liabilities for which respondent became responsible by assuming the performance of Windsor's contract (Ausplund v. Aetna Indemnity Co. supra) are found in the original contract between appellees and the State (R. p. 74), the sub-contract between Windsor and appellees, (R. p. 80), the bond on the sub-contract (R. p. 88), and the additional agreement between the appellant and appellees evidenced by the letter of October 30, 1925. (R.

p. 106). These instruments are the basis of the action herein, (R. pp. 2-6), and must be construed together.

Price v. Garland, (N. M.) 6 Pac. 472;
U. S. F. & G. Co. v. Robert Grace Co., 263 Fed. 283;
Francis Bros. v. Boiler Co. 109 Fed. 838;
Watson v. O'Neill, 14 Mont. 197;
U. S. Natl. Bank v. Chappell, 71 Mont. 553;
Gary Hay and Grain Co. v. F. & D. Co., 255 Pac. 722;
Natl. Surety Co. v. Lincoln County, 238 Fed 705;
9 C. J. 36.

There was of course ample consideration for the agreement evidenced by the letter of October 30, 1925. Appellees gave up their right to take over the work. They permitted the money to be paid directly to appellant. They waived their right to deduct from estimate No. 6, advances made to Windsor. In any event, the burden was upon appellant to show no consideration and this it did not do.

Farmers State Bank v. Probst, (Mont.) 263 Pac. 693.

The obvious intention of the parties, gathered from the instruments themselves, and from appellant's acts and letters, was that appellant assumed all of Windsor's responsibilities, and that intention is binding herein.

Blankenship v. Decker, 34 Mont. 292;
Inman Mfg. Co. v. American Cereal Co., (Ia.) 110 N. W. 287.

Such was the construction placed upon the contracts by the parties themselves. Thus Crichton agreed to pay the 12½% due appellees, (R. p. 101), and that was the understanding of appellees (R. p. 107). On June 8, 1926, Crichton sent the money due on one estimate (R. pp. 113,

114), and advised that additional money would soon be forthcoming (R. p. 116), and again on June 28, 1926, (R. p. 118). On July 1, 1926, (R. p. 119) Crichton wrote of the receipt of a telegram from appellant stating: "Mr. Taylor is emphatic and desires you to pay no material bills, *or Lalonde, Peck & Powers' percentage until job is complete. Our bond protects Lalonde, Peck and Powers percent and we will not pay that until final.*"

Again Crichton wrote, (R. p. 120): *"Have authority from Federal to pay you 12½% on last estimate."*

Such construction is binding upon appellant herein.

Butte Water Co. v. Butte, 48 Mont. 386;
Knapp v. Andrus, 56 Mont. 37;
Nat. Bank v. Ingle, 53 Mont. 414;
Berne v. Stevens, 67 Mont. 254;
Ferry & Co. v. Forquer, 61 Mont. 336;
6 Cal. Jur. p. 304;
U. S. Natl. Bank v. Chappell, 71 Mont. 553.

Further, having for any purpose taken over the Windsor contract and received the benefits thereof, appellant cannot refuse to bear the burdens.

Stone-Ordean-Wells v. Anderson, 212 Pac. 853;
Hills v. Johnson, 52 Mont. 65;
McConnell v. Blackley, 214 Pac. 64;
6 Cal. Jur. p. 60.

The original contract and sub-contract required Windsor to (1) complete the project; (2) pay appellees 12½% of the money received; (3) repay all advances; (4) pay all assessments under the Workmen's Compensation Act. Such then are the responsibilities assumed by appellant. By the subsequent arrangement between appellant and appellees a different method was devised and agreed to for the payment of the 12½%. Such arrangement created no new obligation but crystallized the agreement be-

tween the parties and evidenced, beyond question, the intention of the parties. From the responsibilities thus assumed appellant cannot escape upon any theory. There is nothing in the two cases cited by appellant on page 20 of its brief which militates against this conclusion. Such authorities merely hold that a surety is not bound beyond the terms of its contract. With such statement we do not disagree. But when a surety, either corporate or individual, in pursuance of the terms of an understanding, assumes the performance of the principal's contract, such surety, by being subrogated to the rights of the principal thereunder, must necessarily become subject to all his liabilities.

Ausplund v. Aetna Indm. Co. (Ore.) 81 Pac. 577.

2. Was Any Competent Evidence Introduced Showing the Expenditure of Any Sum by Appellant?

In the previous section of this brief we assumed for the purpose of argument that competent evidence was introduced showing the expenditure of $76,531.87, and a deficit of appellant in the amount of $29,367.75 (Appellant's brief p. 19).

From the argument made by appellant it is evident that the whole basis of its contentions upon this appeal is the evidence introduced which appellant claims shows such expenditure and such deficit.

This evidence appears in the testimony of Crichton (R. pp. 234-244) and S. M. Toole (R. pp. 256-279). Crichton testified substantially as follows: That he paid for labor, materials and supplies on the job (R. pp. 234-235). That about a thousand checks were issued. That he paid the prevailing price in every instance (R. p. 237). That

he assisted Toole in making an audit of the books and checks (R. p. 238). That so far as he knows everything purchased went into the job (R. p. 243). That the various things purchased were necessary (R. p. 244).

No attempt was made during this examination to identify a single check, order or book or to show what had been paid out by appellant.

Toole testified as follows:

That he made an audit of the books and records of appellant in connection with the Windsor contract (R. p. 257). That in making the audit it was necessary for him to inspect more than a thousand checks and other records (R. p. 259). That as to labor and material his audit shows $38,583.77, (R. p. 260); supplies $19,945.76, (R. p. 261); materials, $1,423.77, (R. p. 261); repairs $3,487.87, (R. p. 262); hauling $7,131.34, (R. p. 263); tools and equipment $3,529.08, (R. p. 264); freight and express $184.18, (R. p. 264); insurance $653.24, (R. p. 265); traveling expense, $140.00, (R. p. 265); expense of Thomas Eline $719.07, (R. p. 266); expense of Toole, $310.96, (R. p. 267); telephone and telegraph $127.92, (R. p. 268); board and labors, $90.72, (R. p. 269); employment agents, $5.80, (R. p. 269); miscellaneous $198.39, (R. p. 270).

The checks were offered in evidence in bundles in accordance with the above subdivisions. Some of the checks were from the Home Office, some from the office of Crichton, and some from records kept on the job. (R. p. 271).

Toole had personal knowledge of his own expense account, a large portion of which had nothing to do with the cost of construction of the road (R. p. 272). Other-

wise, except for a few scattering items he had no personal knowledge of any of the checks or items (R. pp. 272-276).

The only foundation for the checks was as follows, (R. pp. 260-271):

"Q. Now, have you the checks with you from which you have made that audit covering those items?

A. Yes, sir.

Q. Will you hand them to me, please?

(Witness complies.)

Q. Referring to Exhibit 49, you may state what that is?

A. That is a bundle of checks issued on the job, the C. H. Windsor job, in payment of labor and services bills.

Q. And does the amount of those checks which you have in your possession, defendant's exhibit 49, as audited by you, total or compute the same amount to which you have just testified?

A. Yes, sir.

MR. MELRIN: We offer in evidence defendant's Exhibit 49."

The exhibits were introduced under objection.

Crichton on being recalled gave further testimony as follows: (R. pp. 279-281):

That exhibit 60 was given for telephone and telegrams; that he assisted Toole in making the audit and went over the various checks. That the checks, Exhibits 49-63 were paid by the Federal Surety Company. That he was instructed to take out insurance.

No books or records, other than the bundles of checks were even offered in evidence. The checks were not identified by any person who testified as to their correctness

or genuineness, or had any personal knowledge of the transactions. Toole merely used them with other records in making his audit in which he was assisted by Crichton. Under such circumstances there was, of course, no foundation for the admission of the checks.

Pabst Brewing Co. v. Horst Co., 229 Fed. 913;
Meredith v. Roman, 49 Mont. 204;
State v. Yegen, 74 Mont. 126;
State v. Asal, 256 Pac. 1071;
Wasley v. Dryden, 66 Mont. 17;
Gallatin Alliance v. Flannery, 59 Mont. 534;
22 C. J. 864 et seq;
Phillips v. United States, 201 Fed. 259.

With no foundation for the checks and with no other records even offered in evidence, Toole's audit is the only thing remaining in the record upon which appellant can base its claim that the evidence shows that it paid out more than the penalty of the bond. Appellant claims that proper foundation was laid for such evidence under R. C. M., 1921, Section 10516, subd. 5.

Section 10516 provides:

"There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, *and the evidence sought from them is only the general result of the whole.*"

In Silver v. Eakins, 55 Mont. 210, the court said:

"In so far as it was sought to show general results merely—for instance, the balance deducible from computation—the witness was properly permitted to state what was shown by the ledger."

The person testifying was the cashier of a bank under whose supervision the books were kept.

In Globe Mfg. Co. v. Harvey, (Cal.) 196 Pac. 261, the summary was made by defendant himself from the original bills, of which defendant had personal knowledge, and defendant could testify as to their correctness, which he did of his own knowledge.

In McPherson v. Great Western Milling Co. (Cal.) 186 Pac. 803, the books were in the possession of the opposing party and appellant had it in its power to show any error.

In the present case the opposite is true. The books and records were all in the possession of appellant. It could produce them or not as it desired. Toole, who testified as to the accounts, had little or no personal knowledge of the transaction or the records. He could not be cross-examined as to their genuineness or correctness. No witness available to appellees knew anything about the matter.

The rule in this respect seems to be as set out in 22 C. J. 1017:

> "Where the results of voluminous facts contained in writings, or of the examination of many books and papers or records, are to be proved, and the necessary examination of this documentary evidence cannot be satisfactorily made in court, it may be made by an expert accountant or other competent person, and the results thereof may be proved by him, *if the books, papers, or records themselves are properly in evidence, or their absence satisfactorily explained.*"

See also:

> Pabst Brewing Co. v. Horst Co., (Cal.) 229 Fed. 913, 918.

Furthermore, a great deal in addition to mere general results was in question here.

In its answer appellant alleged (R. pp. 39, 50) that the

money was expended by it in the construction of the road, and that such expenditure represented the reasonable and market value, and that the items were necessarily incurred. There is no evidence that such was the fact. Toole, a mere auditor, could not so testify even under the statute. Crichton, the only other person testifying, did not identify a single check as being a necessary or reasonable expenditure, or that the checks and records audited by Toole represented payments for construction of the project or were reasonable or necessary.

Under no conceivable set of circumstances can it be said that a proper foundation was laid for either the checks or for Toole's testimony. The District Court acted properly in disregarding it. Without it appellant is admittedly without basis for this appeal.

Since the whole contention made by appellant was that the expenditures made by it were necessary and reasonable, appellees had the right to meet that issue with evidence as to what the project should have reasonably cost. Powers was qualified to testify (R. pp. 281-283). His testimony as to the reasonable cost was competent.

22 C. J. 564.

The effect to be given his testimony was for the Court.

22 C. J. 728;

Solberg v. Sunburst Oil & G. Co., 246 Pac. 168;

Certainly appellees were not bound by evidence that appellant necessarily and reasonably expended a certain sum in completing the project.

What effect the court gave to this evidence is not apparent from its memorandum. Since it held that there was no foundation for the testimony of appellant, it probably disregarded it. In any event upon appellant's own

theory of the case such evidence was competent. Farther than that we need not go herein.

3. Conclusion.

By no method may appellant prevail herein. There is no foundation for the evidence which appellant admits is the basis of the appeal. Even assuming a foundation for such evidence appellant is bound by its contract with appellees, which they seek here to enforce and upon which judgment was rendered. Under such circumstances it is submitted that the judgment of the lower court must be affirmed.

Respectfully submitted,

HURD, HALL & McCABE,
H. C. HALL,
E. J. McCABE,
Attorneys for Appellees.

Service of the within brief and receipt of a copy thereof admitted this.....day of....., 1929.

.....

.....

Attorneys for Appellant.

No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an Infant, by WILBUR HOULE, his Guardian Ad Litem,

Appellant,

vs.

HELENA GAS AND ELECTRIC CO., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Montana

NO.

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an Infant, by WILBUR HOULE, his Guardian Ad Litem,

Appellant,

vs.

HELENA GAS AND ELECTRIC CO., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Montana

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

(Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.)

	Page
Answer	10
Assignment of Errors	146
Bill of Exceptions	18
Certificate of Clerk U. S. District Court to Transcript of Record	150
Citation on Appeal	147
Complaint	2
Decision Directing Verdict for Defendant	133-140
Deposition of Charlotte Loble	122
Judge's Certificate to Bill of Exceptions	141
Judgment	17
Minutes of Court—July 26, 1928—Trial	14
Minutes of Court—July 27, 1928—Trial	16
Motion for Directed Verdict	132
Names and Addresses of Attorneys of Record	1
Opinion of Court on Motion for Directed Verdict	133
Order Allowing Appeal	146
Petition for Appeal	143
Praecipe for Transcript of Record	148
Reply	13
Stipulation re Bill of Exceptions	142
Stipulation re Record	149
Trial	14
Verdict	17, 18

INDEX—(Continued)

WITNESSES.

Page

FOR PLAINTIFF:

Cummings, Fred L.
Direct Examination 45
Cross Examination 47
Re-Direct Examination 48

Hawkins, Thomas L.
Direct Examination 24
Cross Examination 26

Houle, Elroy Carl
Direct Examination 19
Cross Examination 21
Re-Direct Examination 23

Houle, Wilbur
Direct Examination 49
Cross Examination 51

Houle, Mrs. Wilbur
Direct Examination 52

Johnson, Lillian A.
Rebuttal
Direct Examination 118
Cross Examination 119

Lane, Marion
Direct Examination 27
Cross Examination 29

Lane, Norris
Direct Examination 35
Rebuttal
Direct Examination 119
Cross Examination 120

Loble, Charlotte
Direct Examination 122
Cross Examination 127

Reynolds, Al
Direct Examination 55
Rebuttal
Direct Examination 111
Cross Examination 115
Re-Direct Examination 118

INDEX—(Continued)

Page

Ropes, Leavitt
Direct Examination 19

Tomchek, Steve
Direct Examination 30
Cross Examination 33
Recalled
Direct Examination 54
Cross Examination 55

Tomchek, Mrs.
Direct Examination 37
Cross Examination 38
Rebuttal
Direct Examination 120
Cross Examination 121

Williams, Elmer
Direct Examination 39
Cross Examination 41

Yund, Walter S.
Direct Examination 42
Cross Examination 44

FOR DEFENDANT:

Bernier, Charles A.
Direct Examination 76
Cross Examination 83
Re-Direct Examination 89, 91
Re-Cross Examination 95

Brooke, Ben C.
Direct Examination 65
Cross Examination 66

Eickmeyer, Henry
Direct Examination 70
Cross Examination 71

Fleming, Roy
Direct Examination 73
Cross Examination 74

Kellar, William
Direct Examination 97
Cross Examination 99

INDEX—(Continued)

	Page
Lyle, Harry	
Direct Examination	71
Cross Examination	72
Re-Direct Examination	73
McCann, E. S.	
Direct Examination	110
Maughn, William E.	
Direct Examination	56
Cross Examination	60
Re-Direct Examination	64
Re-Cross Examination	64
Recalled	
Direct Examination	91
Mitchell, John	
Direct Examination	69
Cross Examination	70
Schultz, A. T.	
Direct Examination	106
Cross Examination	108
Sheriff, Fred	
Direct Examination	66
Cross Examination	68
Stussey, William	
Direct Examination	101
Cross Examination	104

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

LESTER H. LOBLE, Helena, Montana,
HUGH R. ADAIR, Helena, Montana,

Attorneys for Plaintiff and Appellant.

GUNN, RASCH, HALL & GUNN, Helena, Montana,

Attorneys for Defendant and Appellee.

In the District Court of the United States, District of Montana.

No. 1340.

ELROY CARL HOULE, an Infant, by WILBUR HOULE, his Guardian Ad Litem,

Plaintiff,

vs.

HELENA GAS AND ELECTRIC CO., a corporation,

Defendant.

BE IT REMEMBERED, that on June 9th, 1928, plaintiff's complaint was filed herein which is in words and figures as follows, to-wit:

(Title of Court and Cause)

COMPLAINT.

The plaintiff complains and alleges:

I.

That he is under the age of twenty-one (21) years, to-wit, of the age of sixteen (16) years.

II.

That on, to-wit, the 21st day of May, 1928, at Helena, Lewis and Clark County, Montana, the above named Wilbur Houle was duly appointed by the District Court of the First Judicial District of the state of Montana in and for the said county of Lewis and Clark, the guardian of the above named Elroy Carl Houle, for the purposes of this action and that on said day letters of guardianship were duly and regularly issued out of said court to said Wilbur Houle and that same have never been revoked and that said Wilbur Houle now is such guardian of said Elroy Carl Houle as aforesaid.

III.

That at all of the times herein mentioned the said Wilbur Houle and the said Elroy Carl Houle were and each of them now is a citizen and resident of the state of Montana, residing in the city of Helena, Lewis and Clark County, Montana.

IV.

That this suit involves a civil controversy and that the matter in controversy in the above entitled

action between said plaintiff and said defendant exceeds the sum of Three Thousand Dollars ($3000.00) exclusive of interest and costs.

V.

That at all the times herein mentioned, the city of Helena, was, and now is a municipal corporation, organized and existing under and by virtue of the laws of the state of Montana.

VI.

That at all the times herein mentioned, Ewing Street was, and now is a public street, highway and thoroughfare in said city running in a northerly and southerly direction, and that said street is now and at all times for many years past was extensively used and traversed by the residents and inhabitants of said city and by the public generally.

VII.

That at all the times herein mentioned Eighth Avenue and Ninth Avenue were parallel streets running in an easterly and westerly direction and intersecting said Ewing Street at right angles with said Ewing Street.

VIII.

That at all the times herein mentioned there was and now is a public side walk, constructed of cement and about six feet wide, on the easterly side of said Ewing Street between said Eighth Avenue and said Ninth Avenue and that said side walk then was, now is and for many years last past has been much and extensively used by the resi-

dents and inhabitants of said city and by the public generally.

IX.

That at all the times herein mentioned the defendant Helena Gas and Electric Company, was and now is a foreign corporation duly organized and existing under and by virtue of the laws of the state of Delaware and that it was and is a citizen and resident of said state of Delaware.

X.

That at all times herein mentioned the defendant was and now is engaged in the business of supplying and distributing electric current for light, heat, power and commercial purposes throughout the city of Helena and the county of Lewis and Clark, State of Montana and that said defendant was and is duly authorized by the state of Montana to engage in and conduct such business.

XI.

That at all the times herein mentioned the defendant, in the course of its said business, did and does now keep and maintain upon and along the streets of said city and particularly upon said Ewing Street and the easterly side thereof a line of poles and wires carrying and conducting electric current of a very high and dangerous voltage and that at all of said times said electric current, poles and wires were under the control, supervision and management of the said defendant herein.

XII.

That at all times herein mentioned the said line of poles of said defendant, along and on the said easterly side of said Ewing Street between said Eighth Avenue and said Ninth Avenue, was situate along the westerly side of said public side walk on the easterly side of said Ewing Street at approximately four feet distant from said public side walk; that at said time and place said poles had cross arms near the top thereof upon and over which cross arms said wires carrying said high and dangerous electric current as aforesaid, were stretched and located; that at said times and place said wires carrying such electric current as aforesaid were approximately twenty-seven (27) feet above the surface of said public side walk on said easterly side of said Ewing street.

XIII.

That at the time and place aforesaid one of said wires, hereinafter more particularly mentioned, and being part of defendant's said line, was carrying an electric current in voltage of approximately 2000 volts and that said electric current so being carried and conducted by said wire at said time and place was extremely dangerous to life, being sufficient in power to do great bodily injury and harm to all persons coming in contact therewith and that said electric current required great care in its transmission to avoid contact with persons and especially with travellers and pedestrians passing along and upon said Ewing Street in said city.

XIV.

That during the night of January 11th, 1928, at a point on the east side of said Ewing street between Eighth Avenue and Ninth Avenue in said city one of the said wires so owned and maintained by defendant as aforesaid and carrying and conducting electric current of such high and dangerous voltage became broken and disengaged from its fastenings and one end of same fell to the ground and upon the said public side walk along and *in* the easterly side of said Ewing Street.

XV.

That at said time and place, the said defendant in violation of the duty it owed to the public generally and to this plaintiff in particular, negligently, carelessly and recklessly allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily charged with such high and dangerous electric current in voltage of approximately 2000 volts, to be and remain upon said public side walk on the easterly side of said Ewing Street, to the great danger of all passers-by.

XVI.

That at the time and place aforesaid and in the night time the plaintiff Elroy Carl Houle was lawfully proceeding along and upon said public sidewalk on the easterly side of said Ewing Street between said Eighth Avenue and said Ninth Avenue and while said plaintiff was ignorant of the presence and character of said wire he, the said Elroy Carl Houle, came in contact with said wire, broken

and disengaged as aforesaid, and the said high and dangerous voltage electric current was thereby transmitted into the body of the said Elroy Carl Houle; that the said Elroy Carl Houle thereby received through his body a heavy charge of electricity giving him a great and painful shock, knocking him down, rendering him unconscious and seriously and painfully burning him and causing him great physical pain, suffering and mental anguish.

XVII.

That by reason of the foregoing and the said negligence of the defendant the said plaintiff was grievously burned and injured and suffered great pain; that his left hand was painfully and seriously burned; that the palm thereof became and was seared and the tissue thereof destroyed; that the index finger on his said left hand became and was rendered numb and without sensation; that his left arm was painfully and seriously burned; that his right hip was painfully and seriously burned; that holes were burned in his left arm and that he then and there sustained and suffered a severe shock to his entire nervous system by reason of the injuries so inflicted; that the injuries so inflicted are permanent in character and that by reason of said injuries the said Elroy Carl Houle has constantly suffered, still suffers and for a long time will continue to suffer great and excruciating bodily and mental pain and anguish and that the use of his left hand and arm will be permanently injured and impaired, all to the great damage, in-

jury and loss to the said Elroy Carl Houle in the sum of Twenty-five Thousand Dollars ($25,000.00).

XVIII.

That it became and was the duty of the defendant in managing, maintaining, operating and using its said plant and in conducting its said business and particularly in providing, keeping, maintaining and using said wire upon and along the easterly side of said Ewing Street at the place aforesaid, to use the utmost human care, vigilance and foresight reasonably consistent with the practical operation of its said plant and to provide against all reasonable probable contingencies and not to permit or allow said wire carrying such high and dangerous voltage as aforesaid to lie, hang down, be or remain so near the said street or side walk as to come into contact with persons travelling thereon, thereby endangering the lives of such persons and it became and was the duty of said defendant to so manage, maintain, operate and use said wire carrying such high and dangerous voltage as aforesaid so as not to injure the said Elroy Carl Houle, plaintiff herein, all of which things and duties the said defendant failed and omitted to do and perform.

XIX.

That by reason of the premises and because of the acts, conditions, conduct, omissions, carelessness and negligence of the defendant in this complaint alleged and the defendant's want of care as

aforesaid, plaintiff has been and is injured and damaged in the sum of Twenty-five Thousand Dollars ($25,000.00).

XX.

Plaintiff further states that all of the acts, omissions and conduct herein complained of on the part of the defendant were negligent and careless acts and the proximate cause of plaintiff's injuries, without which negligence and carelessness the said injuries on and to this plaintiff would not have occurred, and the plaintiff further says that at all times herein mentioned, the plaintiff was in the exercise of due care and without fault.

WHEREFORE: Plaintiff demands judgment against the defendant:

1. For the sum of ($25,000.00) Twenty-five Thousand Dollars.
2. For costs of suit.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Plaintiff,
Helena, Montana.

(SEAL)

UNITED STATES OF AMERICA,
STATE OF MONTANA,
County of Lewis and Clark,—ss.

Wilbur Houle being first duly sworn deposes and says: That he has read the foregoing complaint and knows the contents thereof and that the matters and things therein alleged are true to the best

of his information, knowledge and belief, that he is the guardian of Elroy Carl Houle, the plaintiff herein and makes this verification as his said guardian and for and on his behalf.

WILBUR HOULE.

Subscribed and sworn to before me this 9th day of June, 1928.

LESTER H. LOBLE,
Notary Public for the State of Montana.
Residing at Helena, Montana.
My commission expires Feb. 1, 1930.

(NOTARIAL SEAL)

(Filed June 9th, 1928.)

THEREAFTER, on July 2, 1928, defendant's answer was filed herein, which is in words and figures following, to-wit:

(Title of Court and Cause)

ANSWER.

Comes now the defendant and for answer to the complaint on file in the above entitled cause:

I.

Admit the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII of said complaint.

II.

Admit that during the night of January 11, 1928, at a point on the east side of said Ewing Street between Eighth Avenue and Ninth Avenue, in said city of Helena, one of said electric light

wires, owned and maintained by the defendant, and carrying and conducting electric current of high and dangerous voltage, was broken, causing the wire on either side of such break to fall to the ground on the easterly side of said Ewing Street.

III.

Denies each and every allegation of paragraph XV of said complaint.

IV.

Admits that the plaintiff, while lawfully proceeding along on the easterly side of Ewing Street, between Eighth Avenue and Ninth Avenue, came in contact with said wire, broken as aforesaid, and sustained some injury to his left hand, arm and hip; but as to the extent and character of such injury, defendant denies any knowledge or information thereof sufficient to form a belief.

V.

Admits that it was the duty of the defendant in maintaining and using said wires along the easterly side of said Ewing Street, to exercise reasonable care and precaution, consistent with the practical operation of its business, to provide against injury therefrom by persons using said street and sidewalk.

VI.

Denies each and every allegation of paragraphs XIX and XX of said complaint.

VII.

Denies each and every allegation of said complaint, not hereinbefore specifically admitted or denied.

FOR A FURTHER ANSWER AND SEPARATE DEFENSE TO SAID COMPLAINT, DEFENDANT ALLEGES:

I.

That the injuries received by the plaintiff on the night of January 11, 1928, and referred to in his complaint herein, were the result of an unusual, excessive, extraordinary and unprecedented wind and storm, which no care, caution, or human foresight could have prevented, and which wind and storm was of such extraordinary severity that it caused electric light wires to break, and, before the defendant knew of such breaking of said wire on Ewing Street or had a reasonable opportunity to learn of the same, the injuries to the plaintiff occurred.

WHEREFORE, having fully answered, defendant prays that it be dismissed hence with its just costs.

GUNN, RASCH, HALL & GUNN,
Attorneys for Defendant.

STATE OF MONTANA,
County of Lewis & Clark,—ss.

A. T. Schultz being first duly sworn, says: That he is an officer of the defendant, Helena Gas & Electric Company, to-wit: Its General Manager,

and that he makes this verification as such officer for and on its behalf. That he has read the foregoing answer and knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge, information and belief.

A. T. SCHULTZ.

Subscribed and sworn to before me this 2nd day of July, A. D. 1928.

E. M. HALL,
Notary Public for the State of Montana.
Residing at Helena, Montana.
My commission expires August 5, 1928.

(NOTARIAL SEAL)

(Filed July 2nd, 1928)

THEREAFTER, On July 5th, 1928, plaintiff's reply was filed herein which is in words and figures following, to wit;

(Title of Court and Cause)

REPLY

Now comes the plaintiff above named and for his reply to the answer of the above named plaintiff heretofore filed herein and particularly that portion thereof designated "a further answer and separate defense to said complaint" set forth on pages 2 and 3 thereof, admits that the injuries to the plaintiff occurred on the night of January 11, 1928, but denies each and every other allegation, matter and statement contained therein.

WHEREFORE plaintiff demands judgement as in his complaint herein.

Lester H. Loble,
Hugh R. Adair,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
STATE OF MONTANA,
COUNTY OF LEWIS AND CLARK,—ss.

Wilbur Houle being first duly sworn deposes and says: That he has read the foregoing reply and knows the contents thereof and that the matters and things therein alleged and set forth are true to the best of his information, knowledge and belief; that he is the guardian ad litem of Elroy Carl Houle, the plaintiff herein and makes this verification as his said guardian and for and on his behalf.

WILBUR HOULE.

Subscribed and sworn to before me this 5th day of July, 1928.

HUGH R. ADAIR,
Notary Public for the State of Montana.
Residing at Helena, Montana.
My commission expires Aug. 19, 1930.
(NOTARIAL SEAL)

(Filed July 5th, 1928.)

MINUTES OF COURT—JULY 26, 1928—TRIAL.

THEREAFTER, on July 26, 1928, minute entry of the record of trial was duly entered herein, being in words and figures as follows, to-wit:

No. 1340, Elroy C. Houle, Etc. vs. Helena Gas & Electric Co.

This cause came on regularly for trial this day, Messrs. Loble and Adair appearing for plaintiff and E. M. Hall, Esq. appearing for defendant. Thereupon the following persons were duly empaneled, accepted and sworn as a jury to try the cause, viz: E. C. Henry, James W. Cory, M. F. Marsh, Bob Hanson, William C. Barden, Peter Erickson, Fred Kaller, L. Kelsey Smith, F. F. Christman, Frank Gibson, E. J. Hahn and Harry Almquist. Thereupon Leavitt Ropes, Elroy Houle, Thomas L. Hawkins, Marion Lane, Steve J. Tomcheck, Norris Lane, Mrs. Steve Tomcheck, Elmer Williams, Walter S. Yund, Fred L. Cumming, Wilbur Houle, Mrs. Wilbur Houle and Al Reynolds were sworn and examined as witnesses for plaintiff, whereupon plaintiff rested. Thereupon William E. Maughn, Ben C. Brooke, Fred B. Sheriff, John Mitchell, Henry Eickemeyer, Harry Lyle, Roy Fleming and C. A. Bernier were sworn and examined as witnesses for defendant, and defendant's exhibits 1, 2, and 3, being two pieces of wire and two charts introduced in evidence, whereupon further trial of cause was ordered continued until 9:30 A. M. tomorrow and the jury excused until such time.

Entered July 26, 1928.

C. R. GARLOW, Clerk.

MINUTES OF COURT—JULY 27, 1928—TRIAL.

THEREAFTER, on July 27, 1928, minute entry of the record of trial was duly entered herein, being in words and figures as follows, to-wit:

No. 1340, Elroy Carl Houle, Etc. vs. Helena Gas and Electric Co.

Counsel for respective parties with the jury present as before and trial of cause resumed. Thereupon William E. Maughn and C. A. Bernier were recalled and testified for defendant and William Keller, William Stussy, A. G. Schultz and B. S. McCann were sworn and examined as witnesses for defendant and certain documentary evidence introduced, whereupon defendant rested. Thereupon Al Reynolds, Norris Lane and Mrs. Steve Tomcheck were recalled and testified in rebuttal and Mrs. M. Johnson was sworn and examined as a witness in rebuttal and a certain deposition of Charlotte Loble was introduced and read in evidence whereupon plaintiff rested and the evidence closed. Thereupon defendant moved the court to direct the jury to return a verdict in its favor and against the plaintiff for lack of proof, whereupon, after hearing the arguments of counsel, court ordered that said motion be and is granted. Thereupon James W. Cory was appointed by the court as foreman of the jury and a verdict in accordance with the court's ruling was signed by him as such foreman and said verdict ordered filed and entered, being as follows, to-wit:

"We, the jury in the above entitled action, find the issues in favor of the defendant. James W. Cory, Foreman."

Thereupon judgment in accordance with such verdict was ordered entered.

Thereupon the plaintiff excepted to the ruling of the court and exception was duly noted. Thereupon plaintiff was granted fifteen days for a bill of exceptions.

Entered July 27, 1928.

C. R. GARLOW, Clerk.

THEREAFTER, on July 30, 1928, judgment in favor of defendant was duly entered herein, which is in words and figures following, to-wit:

(Title of Court and Cause)

JUDGMENT.

This cause came on regularly for trial on the 26th day of July, 1928 in the above-entitled court, before Honorable George M. Bourquin, Judge, and a jury duly impanelled to try the issues in said action, the plaintiff being represented in person and by counsel, and the defendant being represented by counsel. At the close of all the evidence, the defendant made a motion for a directed verdict in behalf of the defendant, which motion, after argument by the counsel for the parties plaintiff and defendant, was granted by the court.

WHEREUPON, the court directed one of the jurors to sign a verdict in behalf of the defendant, which verdict, omitting the title of the case, is in words and figures as follows:

"We the jury in the above entitled case find the issues in favor of the defendant.

(Signed) JAMES W. CORY,
Foreman."

WHEREFORE, it is now ORDERED, ADJUDGED AND DECREED that the said action be dismissed and that the defendant recover its costs incurred in the defense of said action, taxed at the sum of $67.30, and that the defendant have execution against the plaintiff therefor.

Judgment entered this 30th day of July, A. D. 1928.

C. R. GARLOW, Clerk.
By MAE O'DONNELL, Deputy.

(Court Seal)

THEREAFTER on September 24, 1928, plaintiff's bill of exceptions was duly filed herein being in the words and figures following, to-wit:

(Title of Court and Cause)

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That the above entitled cause was regularly called for trial on the 26th day of July, 1928, before the Honorable George Bourquin, Judge of the above entitled court and a jury. Lester H. Loble and Hugh R. Adair appeared as counsel for the plaintiff and Gunn, Rasch and Hall appeared as counsel for the defendant. A jury of twelve persons was empaneled to try said cause. Thereafter the following proceedings were had and the following evidence introduced:

LEAVITT ROPES being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Leavitt Ropes; I am sixteen years old; I reside on South Benton; I am acquainted with Elroy Houle. On the 11th day of January 1928 I met him after school, ran his paper route with him and then went to the Church Dinner; left there about half past seven and went down town and met my mother in front of the Marlowe about five minutes to nine, went to the show another man and I met him on Edwards Street and went down town. I got out of the show at eleven o'clock, and I next saw him in front of the Marlowe.

Witness excused.

ELROY HOULE being called as a witness in behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Elroy Houle; I am sixteen years old.

THE COURT: Speak up, witness, so the jury can hear you at this end.

THE WITNESS: I am sixteen; my father's name is Wilbur Houle; I go to school in Helena, to the Helena High School. Early in the evening of January 11th 1928, about seven o'clock, I was at

the Episcopal Church. I know Leavitt Ropes, who was just on the stand; he was with me. From there we went down town and waited in front of the Marlowe for his mother, and then went to the show, the second show; it commenced at nine o'clock and I got out of the show about eleven; then went to Brady's and stayed there about five minutes; then went down to Bahnsen's to get some popcorn for about three minutes previous to starting home. I was living at 823 Ninth. In going home I went up Sixth Avenue to Allen Street and crossed by the Gym and up Seventh and as far as the store on the south side of Eighth, across the intersection of Ewing and Eighth and crossed to go down the street. As I crossed the street there I got the shock; that is all I remember. Yes, I got on the south side of Eighth, Eighth and Ewing, at the intersection; I crossed diagonally from that point in the direction of Burn's home; I got upon the sidewalk on the east side of Ewing Street going down towards my home; I got on the sidewalk. I don't remember anything after I got on the sidewalk. I did not know there was any wire of the defendant company in that vicinity which was on the ground, and there was nothing there to indicate or warn me of its presence; I did not know anything at all until afterwards. You ask where I first recall gaining consciousness; I remember a little bit at your house, but not clearly until next day. The next day I found myself in St. Peter's Hospital. I did ascertain afterwards that I had

come in contact with an electric wire of the defendant company; the injury I received from coming in contact with this electric wire was my left hand was burned, and my hip and my right elbow was burned. I had an open burn on my left hand, *white hot down over the skin* down to the flesh; my index finger was paralyzed; I have no sense of feeling in it. You ask me to state which hand I use, whether I am right-handed, or left-handed: I write right handed; I use my left hand in throwing a ball. As to what I was studying in school: I wanted to take up Art. I was in the hospital going on four weeks. After I got out I waited until the next term and returned to school then. I failed in my school work because of this accident. I failed once before. Since the time I received this injury I have been nervous and irritable, and twice I fainted; I had dizzy spells part of the time. One time I fainted was the night of the Baccalaureate Service at the High School, and the other time was about a month ago on Main Street. Before having received this injury I was in good physical condition and strong. Since that I have not been so.

MR. LOBLE: I believe you may examine.

THE COURT: CROSS EXAMINE.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: I recall it was after eleven when I got out of the Marlow; it was about three or four minutes afterwards, and I walked from

there to Brady's and got some Sherbet there; I think I was in there about five minutes and from there I walked on to Sixth Avenue and bought a bag of popcorn, and from there I walked on to the intersection of Eighth and Ewing and I think it was more than fifteen minutes after eleven when I got there, about twenty minutes. I did not notice this wire before I became unconscious; I did not see the wire there; I don't know how I got in touch with it. I don't think there is an arc light on that corner. No, I don't recall seeing any wire. The last I remember of knowing anything was in front of Burn's house; that is a house in front and further south than Mr. Loble's house. I said it was my index finger; it is paralyzed; I mean, it is numb. Yes, I can grip your finger so it is not paralyzed in the sense it is immovable. I was also burned on the hip; I don't think that is troubling me now. I had a burn on the arm; it is all right now; it is not troubling me, but I don't know whether it is serious or not, and, as far as scars, there is not pain in the arm or leg.

I went to the hospital and was there from the night of January 11th to February 3rd; I was in bed about a week and a half, after that I walked around the hospital. You ask if I stayed there until I was able to go home: The Doctor kept me there. I said in my school work I failed this year to pass the grade. Yes, I failed once before.

Q. You don't know whether that failure was the same cause once before or due to this injury?

A. I was getting along fairly well before I was hit, but after that I lost so much it was impossible for me to make it up.

Q. I believe you said you fainted at the Shrine Temple the night of the Baccalaureate?

A. No, it was before I had gone.

THE WITNESS: As to what I doing out there at that time of the evening, I was waiting for Marlowe Haines and Edgar Hall, waiting for the car. I did not go in the car or in the house; I was sitting on the steps waiting for him, when I saw him come up I started to go down the steps and that is all I remember and I picked myself up from the sidewalk. No, I hadn't been eating anything, or anything like that; I felt bad all day. I fainted once down on Main Street; that was about a month ago.

This was the index finger; there is only a small scar there. There are scars on the hand; those scars are kind of spotted around that; there is no solid burn across there like the wire. Here is where it came (indicating). You ask if it was somewhat in the nature of a blister on different parts of the hand: It was burned deeper than a blister; there wasn't any straight burn across there; they were spotted.

RE-DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: The time I reached the point where I was struck would be approximately 11.20.

MR. LOBLE: May I have the witness show the scar?

THE COURT: Yes.

MR. LOBLE (to witness) Step forward and show the scars you have on your hand.

(Witness does so and shows same to the jury.)

MR. LOBLE: That's all.

THE COURT: Next witness.

Witness excused.

DOCTOR THOMAS L. HAWKINS being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Thomas L. Hawkins; I reside in Helena; by profession I'm a Physician and Surgeon; I am a graduate physician licensed to practice in this city and state; I have practiced here three years and am engaged in practice at the present time.

I was called to attend the plaintiff in this case, Mr. Houle, professionally in January of 1928; I was called to 411 North Ewing Street. I think it was 11:30 at night when I reached the house 411 North Ewing Street, and the boy was lying in bed and in a semi-conscious condition; he was shaking all over quite extremely and seemed to be rather much upset. He complained of pain in his hip. The clothes were removed off him, put hot pads against the leg and attempt was made to revive him from the shaking at that time. As soon as we could possibly get him over that we called the

ambulance and took him to the hospital. As to how extensive was the shock there at the time I came to 411 North Ewing Street, he certainly received quite a severe shock and became unconscious. The reason why he was taken to the hospital in an ambulance was because he could not walk. When I got him to the hospital I placed him in a room for treatment; he was treated in the hospital for approximately three weeks, and thereafter for approximately an additional three weeks he came to the office.

The injuries I found upon him and upon his left hand when I treated him was he had an electrical burn on the palm of the left hand which extended down through the skin to the muscles which caused loss of sensation of his index finger and a portion of his middle finger; he had some electrical burns on his hip and on his right elbow, his right hip and right elbow. I believe he had electrical burns on his index finger of his left hand. I have observed his hand and his index finger and have heard him testify he has no sensation in that index finger, and I found him suffering from an injury of that character and that, likewise, was from electrical burns. He was suffering from severe shock of the electrical burns which he received and various burns to the body; that was the primary condition and the condition for which he was treated and the treatment that he received. You say it is admitted here that he was struck by a wire containing a high and dangerous voltage which you allege

contained two thousand volts, and you ask me to state what effect that would have upon the plaintiff in this case by reason of his coming in contact with it: He was suffering from a severe nervous shock from the contact with the wires at the time I saw him. An electric shock is no different from an enormous indication in the air, that is the electric condition to the nerves with the severe shock produce the same thing very much to the nerves, and they all suffer that severe shock; an electrical shock affects the nerves primarily and a voltage of that character has considerable pain, so far as the nerves are concerned. I don't know whether that is the amount used in electrical executions of persons.

Q. From the last time you saw him and the time that you treated him, state whether or not, so far as you are able to say, if the injuries he sustained to his nerves, and shock, are permanent in character?

A. Probably will be permanent injury from the electrical shock that he received.

MR. LOBLE: You may examine.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: It is impossible to tell the future. I say he has no sensation in his front finger. As to his being able to take hold and indicate in the use of the finger, he has muscle power but not the sensation. The principal burn was in his left hand. The burn on his arm or leg did not

produce any permanent or serious result; it was a superficial burn there.

Q. And, as I understand, this burn on the left hand had several spots, kind of a big burn; that is, didn't have the appearance of a burn by a hot poker; just one straight burn but there was blotches around it?

A. He had one large burn, and there was multiple burns.

THE WITNESS: They were not big burns, which is very frequent in electrical burns. Of course I do not know anything about the voltage in this wire after it got down to the ground and the effect that has on the voltage. He was three weeks in the hospital as he stated; he could not have gone home from the hospital and been treated at home; if he could have I would have sent him home. The reason it was necessary to keep him in were the two conditions, that is, his nervous condition and for the treatment of his burns.

Witness excused.

MARION LANE being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Marion Lane; I live at 407 North Ewing Street which is the house referred to as the Burns House; it is next to 411 North Ewing Street where you live, and I was

living there on January 11th 1928 with my mother and sister. I was going to High School here in Helena and I am going there now, except that I am now on vacation. I know Elroy Houle. You direct my attention to the night of January 11th 1928 and ask about what time it was that I came home if I was out: Shortly after eleven, and the unusual thing which I observed just as I started to go into my house was seeing a boy lying on the sidewalk and several people standing over him. I did not see or observe any wire on the sidewalk with the boy lying on it, but I did see it after some time. As to how close I had gotten to the wire just before my attention was called to it, I was just about on it, and I then observed it on the sidewalk. There was nothing about this wire on the sidewalk which would give warning of its presence if some one had not called to me, and when I finally looked on the sidewalk the wire was sputtering; I did not notice that at first. I knew the young man on the sidewalk after I got up; it was Elroy Houle, the plaintiff in this case; he attends High School with me. As to what his condition was at that time: He seemed to be in pain. Then he was taken into the house 411 North Ewing Street. After he was taken into the house I proceeded north on Ewing Street to see how far the wire or the sputtering extended; we went down Ewing in the car and the last time I noticed the wire was down by the little store on Ewing Street; I don't know the number of that house; that little store is on the

corner of Thirteenth and Ewing and is in the six hundred block. I proceeded in the car down to this little store, and I observed on the sidewalk from 411 North Ewing into the 600 block this wire was there; you could see it was sort of sputtering on the sidewalk all the way down.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: I rode along down in the car as far as the little store. I do know that was the same wire because I followed it from my house down; only one wire was down. There are four or five wires on the poles in front of the house. You ask me if I know the wire which came from Eighth Avenue down to the alley and which broke and fell was one of the same wires or one of the other wires on down from that pole: I think it was the same wire, but I don't know; I did not follow it through and come up to the pole to see whether it was this one or some other wire; I don't know how many wires there were; I did go down and saw no other wire sputtering on the ground. I said I got home a little after eleven. No, I had not been to the show. At the time I got home and Houle was on the sidewalk he had not been taken into Loble's house. When I first saw the wire it was lying on the sidewalk. I know where the poles are; one of them is on the south side of Eighth Avenue and the next pole is across the alley from Mr. Loble, and this wire was hanging from the pole, fell down on the ground. I did not see the

wire until after I saw the group and somebody told me there was a live wire; one called my attention to it; that was about fifteen minutes after eleven.

Q. He wasn't unconscious, that is, Mr. Houle was groaning and apparently conscious at the time?

A. He could not speak.

THE WITNESS: He was groaning, and 411, the house they took him in, was Mr. Loble's house; that is the next one down from the Burns house.

MR. HALL: That's all.

THE COURT: Your next witness.

Witness excused.

STEVE TOMCHEK being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Steve J. Tomchek; I reside at 1445 Helena Avenue; I am proprietor of the Drake Hotel.

On the evening of January 11th, 1928, at dinner time, I was at your house, 411 North Ewing Street; those who were there were Mrs. Tomchek, Mr. Loble, Mrs. Loble and myself; I remained *there evening* for some time. Around the hour of about ten o'clock other persons came there. I am acquainted with Elmer Williams and his wife, and

with Walter Yund and his wife; those persons came there on or about ten o'clock that night.

You direct my attention to the time after these guests arrived and ask me to state what if anything I first observed unusual outside of the house 411 North Ewing Street: We saw some flashes of light through the window; that is, between the other house and Loble's house, some flashes of light. I believe Mrs. Loble remarked it seemed funny to see lightning this time of year; I made up my mind it was electric wire. At that time the various persons were all sitting in the living room of the house, and the windows of this living room open on Ewing Street. As near as I can remember I would say it was just about twenty minutes after ten that I first observed these flashes of light, and I think the length of time that these flashes of light continued until anything unusual occurred outside was about forty minutes when we heard someone screaming, then I believe Elmer Williams went out first and I followed him. I know where the Lanes' live and now live, who took the stand; that house is directly south of your house, 411 North Ewing Street, just a few feet. When I got out on the sidewalk I observed a black spot on the sidewalk on the other side of Lane's house, and when I got there there were other persons who had already reached there; those persons were you and Mr. Williams. Then Mr. Williams and you grabbed hold of him, you made a jump, and we both got shocked, or, at least you did. At the time that I

got out there there was nothing at all to indicate there was electricity or a wire down. We pulled him off the sidewalk; you spoke something about flashes, the sidewalk, you said you could feel electricity on the sidewalk. After I had taken hold of him and drawn him back against me I could feel an electric shock. Following that this young man was taken into the residence 411 North Ewing Street. He was at that time unconscious and he was shaking terribly; we got a lot of hot water bottles to warm him; it seemed almost impossible to get him warm. Following that the doctor was called. Up to the time that the boy left the house he had not returned to his normal condition. He was removed from the house, carried out on a stretcher.

Q. What, if anything, if you know, was done to advise the defendant company to shut off their electricity?

MR. HALL: Wait a minute. If the Court please, we object to this testimony as immaterial and incompetent.

THE COURT: It is practically admitted.

MR. LOBLE: Very well.

THE WITNESS: I met Mr. Bernier that night; I do not know that he is connected with the defendant company as superintendent or in general charge of it; he came there to the house on the night in question.

Q. State what, if anything, was said to him at

that time by anyone in reference to the condition of this wire?

MR. HALL: We object to that testimony. There is no allegation in the complaint of any defective condition of this wire or any wire; they are simply relying on the res inter loquitur doctrine, except they do allege as specific ground of negligence that the company negligently and carelessly allowed the wire to remain in a broken conditon on the sidewalk. We object to any testimony in the nature of defective condition of the wire. If they knew of that they should allege and prove it.

MR. LOBLE: That is a conversation had with one of the employees.

THE COURT: No. I think it is necessary. The question is whether he had any authority to make any statement. The objection will be sustained.

MR. LOBLE: Exception.

Relative to the condition of the wires prior to their falling, the conversation.

THE COURT: I can't see its relevance to bind the company.

MR. LOBLE: Very well. You may cross examine.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: I had been in there and while I was sitting in the house, which is back some twenty or thirty feet from the sidewalk I saw several flashes up in the sky; in fact Mrs. Loble said

it might be lightning. No; I can't tell what particular wire was flashing. You say that, in other words, there are four or five wires: I know there are some wires. I could not see from the house what wire, except it was in that general direction. The light must have been directly in front of the house; the light came from between Loble's house and the other house, flashed through the windows; the wire was down all the way, two or three hundred feet. You ask me if this light I saw was on the ground or up in the sky: It showed all across the room.

Q. You don't know whether that light that you saw was from the wire still up on the line or whether it was light from the wire that came in contact with the ground?

A. I think it must be from the ground.

THE WITNESS: Williams and his wife came about ten o'clock, and it was some fifteen or twenty minutes after they came I saw this light, and I would imagine it was the light from the wire that was down; I saw this continuing every once in a while until I heard persons screaming out there and went out. You ask if it was a thawing night and if it wasn't a January chinook, everything melting: It was wet on the sidewalk. You ask if water was there, everything wet: Well, just on the sidewalk.

Q. Well; at that time, on the sidewalk melted snow which would be on the ground?

A. It didn't seem to be on Loble's lawn; it was icy and slippery.

MR. HALL: That's all.

Witness excused.

NORRIS LANE being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Norris Lane; I resid*d* at 403 North Ewine Street; I am a brother of Marion Lane who just left here. Mr. Loble lives next to me. I was living where I now live on the 11th day of January 1928 and prior thereto. I am familiar with the telegraph pole that is in front of and north of 411 North Ewing.

Q. State whether or not within thirty days prior to the 11th day of January 1928 you observed the condition of the wire on this pole?

MR. HALL: We object to that testimony as there is no allegation of any defective condition of the wire and the only allegation of negligence being one, that is this broken wire was allowed to remain there an unreasonable time after it was broke; for the further reason that the plaintiff having elected to stand upon the specific ground of negligence in their complaint cannot rely upon the doctrine of res ipsi loquitur; upon the further ground, if he had any other ground, the defective condition of the wire, they are bound to allege that

and prove it if they can, and rather relying on the premises of negligence under the res ipsi loquitur doctrine.

MR. LOBLE: It may possibly be rebuttal.

THE COURT: Yes, if it comes then, reserve it for then, not now. You rely simply upon negligence and discovery and removal of wire after it fell.

MR. LOBLE: That is correct, but we are showing the general condition of the wires since that time, not specifically. Very well.

THE COURT: Your next witness.

MR. LOBEL: Just one second.

MR. ADAIR: May it Please the Court: In connection with the allegations of negligence in paragraph 15 of the complaint, we allege it was the duty of the company to keep and maintain its plant and wires in a good and safe condition.

THE COURT: You are alleging duty there; you are not alleging negligence; there is no allegation further than they failed to take up this wire in due time—

MR. ADAIR: They permitted it to remain on the ground.

THE COURT: That at said time and place the said defendant in violation of the duty it owed to the public generally and to the plaintiff in particular, negligently, carelessly and recklessly allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily charged with such high and dangerous electric current in voltage

of approximately 2000 volts, to be and remain upon said public sidewalk.

Anything further?

MR. LOBLE: That's all.

Witness excused.

MRS. TOMCHEK being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Mrs. Steve Tomchek; I reside at the Drake Hotel with my husband Steve Tomchek. On the night of January 11th, 1928 I was at your house, 411 North Ewing Street, to dinner. After dinner, Elmer Williams and his wife, and Walter Yund and his wife came to the house; they arrived there approximately about ten o'clock. After they were there sometime, about half an hour after they came, I noticed flashes of light in the front windows and the side windows where the curtains were partially drawn, and Mrs. Loble said that that looks like lightning. You ask me how long I would say it was, approximately, from the time I first observed these flashes until something unusual occurred outside that attracted my attention and the attention of the people inside: I say it was about ten-thirty I observed these lights, and it was after eleven o'clock that our attention was attracted to the outside; we heard

a very unusual noise; somebody said they thought it was a cat; Mrs. Loble said it is not a cat, it sounds like a human, and shortly after that the boys went out, and I was in the house when Elroy Houle was brought in there and I would say that he was unconscious, didn't seem to recognize anyone. The condition of his face was drawn like, and he looked like he was suffering intensely; the muscles were all drawn in the face; we thought he was dead. With reference to his movements after he was put in bed: He laid there quietly for a few minutes and then moved a little, his arms jerked, and he seemed to have a chill, only more severe. After that Doctor Hawkins was called, and he was moved to the hospital in an ambulance.

MR. LOBLE: You may cross examine.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: We came there for dinner; we were there before Mr. Williams and his wife came there. Mr. Yund and his wife, and Mr. Williams and his wife came about ten; I would say it was between ten-twenty and ten-thirty when they came. No, I don't recall looking at my watch. It was quite a while before eleven when I first saw the light because I observed it quite a while. It was after eleven when I heard this voice, and you could observe the light through the side window towards Burns house; most of the light seemed to be flickering from the front, and you could see the flash of it also. I went out there after he was

found, and the wire was all the way clear along the sidewalk.

Witness excused.

ELMER WILLIAMS being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Elmer Williams; my business is Life Insurance Agent for the Equitable Company. I recall the night of January 11th, 1928, and on that night we came to your house, 411 North Ewing Street. We got there about 10:30; we intended coming there earlier and were unable to come; we had company at the house. I recall that at ten o'clock I told you we had company and could not get up and you said: When are you coming along; I remember very well ten o'clock. The other people were Walter and Mrs. Yund. I got to the house 411 North Ewing Street I know shortly after ten; probably a few minutes after ten. We all sat in the front room, and while we were sitting there I observed there was some light flashes coming from the outside and someone mentioned the fact it was rather peculiar to have lightning at that time of the year. I think it was possibly twenty minutes, twenty-five or thirty minutes after we came there I observed these light flashes start; at any rate, it was a short time after

I got there. You ask how long did these lights continue to flash as I have indicated from the outside until I heard anything unusual occurring on the outside: Why, maybe half an hour, or a little more; a little more than half an hour, and then we heard some screaming from the outside and someone said it sounded like a cat; I believe you said it sounded more like a woman's scream, and then we went out and there was a little puddle on the sidewalk which flashed out and ran out to see what it was and come up to Mr. Houle. You ask if you and I ran up the sidewalk when we ran out of the house, and stepped on the sidewalk towards where Mr. Houle was lying: I imagine you ran out and stepped on the sidewalk and then I ran up the sidewalk. At the time I ran up the sidewalk I did not observe any wire of the defendant company on the sidewalk; there was nothing to indicate at that time that there was a wire upon the sidewalk or to call attention to it. When I arrived where Mr. Elroy Houle was his body was about a little way over on the *wrong* side of the sidewalk; his shoulders and head and feet were sticking diagonally out in the sidewalk. It was you who called to my attention there was an electric wire of the defendant company there, then I turned around and looked down the sidewalk and possibly I saw it flash; there was sparks and flashes on the sidewalk, and then I saw the wire of the defendant company, it was on the sidewalk. It evidently was a live wire, because it was sparking. This wire

was not far from the feet of Elroy Houle; it was very close; as a matter of fact I think it was on his feet or across his feet. Yes, I could feel the electricity there at the point where Elroy Houle was; I did not feel it so much at that time but when you and I were taking him off was when I felt it the most; then I could feel it at that time. When Mr. Houle was taken into the house I would say he was in an unconscious condition and the muscles of his face were very much drawn. As a matter of fact, I though he was dead, that is, from his color. After he had been taken in the house and placed in bed he was very quiet and then began having a very severe chill, and after he was in the house a while he began moaning and we got hot water bottles and applied them. He was eventually taken by Doctor Hawkins in an ambulance to the hospital.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: These flashes of light that I saw along about half past ten I don't know what they was or where they came from; they flashed in the window. I don't recall whether I saw more than one wire down there; it was one wire, and the reason that I notice that it was called to my attention; it apparently did have current in it and it flashed intermittently, the same as I saw in the window. It was my idea the flashes were from the wire that was down. It was very wet that night; there was quite a chinook and a heavy wind. Mr.

Houle was lying up right in front of Burn's house, quite a little way up above Loble's.

Q. And, of course, in fixing these times, thirty minutes after ten, you don't recall now looking at your watch when you saw the flashes; that is just impression of how long it happened after that?

A. I remember distinctly about arriving there after ten o'clock.

Q. After coming there and getting talking, just how many minutes before you saw the first flash and until you saw the last, you didn't take any note of the time?

A. No; I just saw them.

Witness excused.

WALTER YUND being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Walter S. Yund; I am employed at the T. C. Power Motor Car Company. On January 11th, 1928 I visited at the residence 411 North Ewing Street; my wife came with me. I know Elmer and Mrs. Williams; they were with me, and I should say that the time of the evening when we got there was in the neighborhood of ten or shortly after. After we got there the various persons in the house sat in the living or front room, which faces on Ewing Street. I could not say how far it is from the front of the

house to the sidewalk, but approximately a hundred, or a hundred and twenty-five feet. As I recall the front windows of this house are close to the ground; it is on the ground floor, and while I was there I observed flashes through the windows. When I first observed these flashes it was, I should say, in the neighborhood of ten-thirty, along there, and at that time it continued, I should say, twenty or thirty minutes until I heard a groan on the outside. I afterwards went outside and saw the boy, Elroy Houle, and he was at that time in the neighborhood of from five to ten feet from the corner, just above the alley, lying on his back close to in front of the Burns house. At or about that time I saw a live wire on the sidewalk. As to how close that live wire appeared to me to be from his feet, I should say a foot or foot and a half. You and Mr. Williams were there at that time and were engaged in trying to get him away from the wire, and I could feel the electrical conditions up to my knees; I got that close to it. No, I did not step on the wire in any way. After the boy, the plaintiff, was taken into the house he looked to me like a person who was close to death, white, and apparently lifeless; the color of his face was white. You ask after he was put in bed what his appearance was in reference to chill: Well, we proceeded to put water bottles on him; he had a severe chill; in fact he shook the whole bed and that condition remained up to the time Doctor Hawkins took him out. An ambulance was called for him.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: I have no definite knowledge of the time I saw him last; my estimate might vary from five to ten minutes. We found him from five to ten feet from the corner of Eight and Ewing. You ask me if these lights which I saw towards the corner where we found him, or directed on the street: The flashes were all along the sidewalk.

Q. Of course, until after you went out and saw the wire down you did not know where the lights were from, whether from electricity, or wires overhead, or wire on the sidewalk?

A. I knew they were electric discharges of some kind.

THE WITNESS: As to my having any idea just where these flashes were coming from at any time, I surmised they were wires, but what wires, whether on the ground or where, I did not know. After I went out there and brought him in I still noticed the wire and flashes after he was gotten in. You ask if I know how long it was after that: Well, we had to be very cautious in removing him; I think it was a matter of twenty minutes or half an hour before those flashes ceased; I imagine they were from this wire sputtering on the ground. There was more than one wire on the pole; in fact I noticed wires out on the pole flashing. I would say it was a windy night.

Witness excused.

FRED L. CUMMINGS being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Fred L. Cummings; by occupation I am Government Engineer with the Cadastral Engineering Service under Scott Harrison. I am a resident of this city and was born in Helena. I am a married man and my family and I live at 356 North Warren Street, at the corner of Twelfth and Warren Streets. The next street paralled to Warren Street is Ewing Street. I was living at that address on the 11th day of January 1928. You direct my attention to that particular date and ask me to state what if anything I observed with reference to wires being down on Ewing Street on that night: Well, may I state indirectly that about ten-thirty on that night I heard the fire siren of the fire truck and went out on the front porch to see if that was true; I believe I heard the thing on the fire truck along on Eleventh Avenue and then I stayed on the porch about five minutes. There was a terrible wind that night; I thought what a terrible calamity it would be if a fire started; I stayed on the porch looking up towards Eleventh Avenue gazing from where I was around the neighborhood; I had the idea of fire in my mind, and then after four or five minutes I went in the house and it occurred to me that perhaps I better go to the back door and see

if there was any signs of burning out of chimneys or anything; several chimneys were visible from the back door. I got to the back door, looked out of the back door directly towards Ewing Street and noticed flashes, intermittent flashes, like lightning; I know it wasn't lightning but that it was some wire that was out of order. I do know where the little store is on the corner of Thirteenth and Ewing, and where I saw those flashes was up the street southward from the corner of the store in between Twelfth and Thirteenth Avenues, and that is the same street upon which 411 North Ewing is , in the six hundred block. I am acquainted with the six hundred block. My house faces back on Warren Street.

Q. After you observed this condition occurring on Ewing Street and had satisfied yourself, as you said, that the wire was down, what did you do, if anything, towards notifying the defendant company, Helena Light and Gas Company, of the condition of their wire?

MR. HALL: If the court please, we object to that upon the ground it is immaterial and incompetent unless it is shown the particular wire that caused this injury, and upon the further ground they have not alleged defect of any wire and they had knowledge of defect of any particular wire in their complaint, and that it is immaterial and incompetent at this time.

THE COURT: I think he may answer.

MR. HALL: Exception.

A. I went to the telephone and looked up the number of the trouble station and called that number.

THE WITNESS: I then gave my name and address; I gave it slowly and carefully so that it would be understood, so that whoever was listening would know I was responsible; told them of these flashes occurring on Ewing Street and that it was evident there was a wire there that needed attention. I don't recall that I said anything with reference to danger from this. After I had told them of this wire and its condition the party at the other end of the line listened to what I had to say and then he checked me on the statement as to the locality: "You say that is on Ewing Street near Twelfth Avenue?" I said "Yes, just below Twelfth Avenue." I don't recall he said anything else except he said: All right, I will tell the lineman.

Q. Having in mind the time generally that you have mentioned, state as near as you can, Mr. Cummings, the approximate time that you called the defendant company and advised them of this condition?

A. Ten-thirty.

Q. That is, in the evening, 10:30 p. m.

A. Yes, sir.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: I testified on direct examination it was about 10:30 I thought I heard the fire alarm; then I went out on the front porch and

looked around about five minutes to see if I could locate the fire and then came back in the house; I did not sit down; I decided before sitting down I would go out to the back, and I think I was there about two minutes before I noted this fire between Twelfth and Thirteenth. You ask if it was between 10:30 and something before I observed that: Those figures are all approximate; I might be off five or ten minutes, approximately. My residence is on the corner of Warren and Twelfth, and the store is on the corner of Ewing and Thirteenth; this is right back of me one street, the one further north of the corner store; I was one block further north and across half a block to Ewing Street. I looked down and saw some sparks between Twelfth and Thirteenth, my impression is I saw the flashes. That is what I told, when I telephoned this fellow, that flashes were coming from between Twelfth and Thirteenth Streets on Ewing Street. I said there was a terrible wind blowing. I believe I told him the wire was out of order and that I thought it ought to be attended to, and he said he would have the lineman out there at once; he wanted to fix the location to be sure, and said: "I will tell the lineman."

RE-DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: After I observed the flashes of light I started to see further up the street to the right on the corner of Ewing and Twelfth, looking directly east I can see that house and look-

ing east there is a vacant lot next to the house on the street and the vacant lot on the right, and looking straight ahead I look towards the Trerise House, I could not see there, but to the left I saw the flashes and likewise saw the light; it appeared to me to be a condition of the wire and that is why I called; I am certain there was a wire in trouble; I am positive of that. The whole idea I had in mind was danger of fire; I didn't think that about the people at that time; it was the fire idea was in my mind and so I made the call.

MR. HALL: If the Court please: I am going to make a motion to strike out the testimony as immaterial for the reason it relates to defendant's wires two or three blocks away; it is wholly immaterial.

THE COURT: Under the circumstances it may be allowed to remain in the record. Motion denied.

WILBUR HOULE being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Wilbur Houle; I am the father of the plaintiff and have lived in Helena forty-eight years. I was not born here; I came here when three months old. The occupation I follow in Helena is Truant Officer of School District No. 1. On the night of January 11th 1928, the night the boy was injured, I was at home late that evening and the time I had occasion to look

at my watch that night was around 11:30; the boy was not home yet, and that is the reason I looked at my watch because he was then unusually late, and I should say it was after 11:30 when I received information where my boy was; I received that information from my wife who answered the telephone call from Mr. Loble saying the boy was injured and, just as soon as I could I got a taxi and came; my wife was not with me, I came alone and she came later. When I reached the residence 411 North Ewing Street I saw the wire on the sidewalk as I stepped out of the taxi and stepped over it. In coming into the house the boy, plaintiff in this case, was in a bed room in bed; he did not recognize me; did not speak to me. I called to him; he did not respond in any way; he seemed to be unconscious, the muscles of his face were drawn out of shape and he seemed to be in pain and he groaned, kind of white faced; he was shaking very much; I expected every moment to see him shake out of bed; he had a hard chill and nervous. Doctor Hawkins was there when I got there and was administering to him. Sometime after that, about two o'clock, he was taken to the hospital. He did not during this time appear to me to regain consciousness. He spoke to his mother after she entered the bedroom; that was sometime later. I saw him during the time he was in the hospital; I saw the condition of his hand that he exhibited to the jury; he never did have that condition before. Prior to this injury the boy was never

nervous; he was very quiet, that is at home, very much; since the accident he is very irritable and nervous, very high minded.

Q. What have you to say about his going into fainting spells? Have you observed this yourself?

A. No, I have not. He called my attention—

MR. HALL: Never mind about that, what he thought or testified to.

THE WITNESS: You ask what I have to say as to irritability, as to whether he ever cried: He has on several occasions. Before that time he did not act that way. The boy was studying for commercial art; that is the profession he selected to follow. Prior to his injury he exhibited considerable interest in that study; he was at home all the time studying. Since the time of his injury he has not appeared to take any interest in it or anything at any time. He is very much more nervous now than he was before.

The testimony that he gave that he was in the hospital from January 11th until February 3rd is correct; and also that he was treated by the doctor for three weeks after. Since that time he has been living at home.

THE COURT: Cross examine.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: I did not notice whether Mr. Bernier was there at Lester Loble's house when I first entered the house; I don't recall that he was there when I got there. I looked at my watch

shortly after eleven o'clock and it was sometime after eleven-thirty I got the notice. I did say on direct examination 11:30, but I did not look at my watch at that time; I did not look at my watch at all after 11:30 when I called the taxi and came in. I said I noticed the wire on the sidewalk as I came to the house; I did not notice whether it was a dead wire or a live wire; I stepped over it.

Witness excused.

MRS. WILBUR HOULE being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Mrs. Wilbur Houle; I am the mother of the boy; I have lived in Helena about twenty-two years; I live at 823 Ninth Avenue. I would imagine it was about 11:30 on the night of January 11th 1928 we were advised of the injury to the boy because we were becoming concerned about him not coming home; I think it was between that and a quarter to twelve you answered the phone and you asked if I had a son named Elroy. I said: Yes; you told me he had been hit with a live wire. I fix that time as between eleven-thirty and a quarter to twelve. After that my husband and I come over; I did not come up in the car; I came later; I imagine about a matter of three-quarters of an hour later. When I got there he was shaking as though having ter-

rible chills; we put hot water bottles and hot pads around him. I don't remember if he did recognize me; I was so overcome I don't remember, he looked so terrible; his face was all smoked and dirty, very pale, what you could see of his face, and the muscles of his face looked swollen and his eyes looked glassy. Just after coming Doctor Hawkins put something on his hands. We thought he was terribly burned. Yes, I saw the burn. As to whether it was burned deep, it looked like it was sore at that time, and later, at the hospital I saw it, it looked like all the flesh on his hand was coming off. His index finger on his left hand was very bad so that it had no feeling only on the end of his finger. I could see from the burn on the left hand it was down through the muscles; it looked terrible; I didn't think it would ever be right. I saw marks of burns on his head but not so badly. There was one burn on his hand and the index finger and the right hip and the right elbow. You ask me to state, prior to this accident and injury to him on January 11th what the boy's disposition and attitude was: We never had any trouble with him; never had any trouble with him, but since he is very hard to manage, and is subject to fainting spells. He was interested in commercial art, very much interested; since that time he has lost interest; he shows no interest in this art work. With reference to his nervousness now since he received the shock from the wire, he is very irritable; he goes away and cries; he seems to get

angry at the least thing anyone may say to him. No, he was not that way before. We have said many times since he received this injury he is altogether a different boy than he was before.

MR. LOBLE: Cross examine.

MR. HALL: No cross examination; Witness excused.

THE COURT: Next witness.

MR. LOBLE: Steve Tomchek—May I recall him for one question?

THE COURT: Yes.

STEVE TOMCHEK a witness heretofore called on behalf of the plaintiff, being recalled testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: I was out in front at the time that Doctor Hawkins arrived at 411 North Ewing Street and, as near as I can fix that time, it was approximately midnight, right close to midnight I should say. At that time this wire that was on the sidewalk was still alive and still on the sidewalk alive. You ask me what I did towards assisting the Doctor to get into the house at 411 North Ewing Street in order that he might avoid contact with this wire: There was a break just below where the sidewalk comes into your house and I directed him down to where the break was because it didn't happen to be flashing at that time; he could have stepped on it, he didn't know it was

there. That was close to midnight. Yes, the wire was severed at that time at that point where he went there; it was broken just below that walk coming in just a short distance.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: As to whether or not I know as he came in at that time that this wire was still alive, I forget. You could see flashes if the wire was moved, you could see flashes. Mr. Bernier was not yet there when the Doctor got there. You say that Doctor Hawkins says he was called about eleven-thirty: I would imagine it was close to midnight when he got there; I don't remember whether I did look at my watch or not; I would say I fix the time definitely within ten or fifteen minutes.

Witness excused.

A. REYNOLDS being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Al Reynolds; the occupation I generally follow is Tire Repair Business; prior to the time I entered in the tire repair business the occupation I followed was lineman. I was at one time in the employ of the defendant company for one year and four months.

Q. Calling your attention to the pole in front of the residence 411 North Ewing Street where I

live, I will ask you if you are familiar with the voltage conducted on the wires upon that pole?

MR. HALL: We admit the voltage; it is alleged in your complaint.

MR. LOBLE: And you just admit a high and dangerous voltage. Would you admit 2000 volts?

MR. HALL: We admit 2000 voltage, 2200 voltage on that wire.

A VOICE: 2300.

MR. HALL: We admit 2300, Mr. Schultz says. It is admitted in our answer.

MR. LOBLE: No, it is not.

THE COURT: Your next witness, if you have one.

Witness excused.

MR. LOBLE: We rest.

WILLIAM E. MAUGHAN being called as a witness on behalf of the defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is William E. Maughan; I live in Helena; I hold the position of Junior Meteorologist in the Government Weather Bureau; I have been in charge of the Weather Bureau eight years. I was on duty on January 11th, 1928; I have the records kept by our department as to the condition of the weather the night of January 11th.

Q. And will you turn to those records and tell us what the conditions were as to wind and storm?

MR. LOBLE: Just a moment. I object to that.

A. We had an exceptionally—

MR. LOBLE: I would like to object unless the witness reads what the record shows.

THE WITNESS: Do you want the notes?

MR. HALL: Yes, I presume so.

THE WITNESS: "The high velocity late in the p. m., and continuing through midnight caused considerable damage to property to the extent of several thousand dollars. Melting snow and ice made hillside streets a menace to traffic. Six electric light wire poles were broken. Boy came near being electrocuted by current of high voltage wire which was blown from a pole. Fire Department answered three calls and prevented any spread of fire. The brick wall of store at Eighth and Hoback was blown down at midnight. Shanty was blown from the top of Mount Helena. Many windows were blown in, street light globes smashed and signs torn down. Roofing also suffered, and a skylight, 20 foot space was ripped from roof of State Capitol. The extreme velocity of 62 miles per hour (three cup) is equal to 77 miles per hour with the old four cup anemometer. The maximum velocity is the greatest since January 2nd 1913, November 12th 1912, and January 14th, 1921."

The damage it did to our own skylights there was it blew out the skylight in the front of store room, and also blew out one of the big windows

in the front room. The three cup anemometer which we had at that time had been placed in use January 1st, 1928, and that registered the extreme velocity of 62 miles per hour; with the old four cup anemometer that velocity was equivalent to 77 miles. You ask me if I stated this was the severest storm since the time I gave you, November 1912, January 1913, and January 1921: I said, the maximum velocity. The notes show the maximum velocity.

Q. Have you your records—have you looked up your records as to how those storms compare with this one, whether it is higher or less.

A. Do you want me to use the actual records, or notes taken from it?

Q. The notes.

MR. LOBLE: That is all right, so far as we may be permitted to use the actual records on cross examination.

A. How do you want that taken? Maximum velocity for five minutes period, or the extreme velocity?

Q. Well, give us both, especially the extreme velocity.

A. The record maximum velocity recorded in the office of this one storm was 62 miles per hour; was on November 22nd 1912, maximum velocity of 70 miles per hour, which would be equivalent to a 57 mile velocity on the three cup, the new instrument now in use.

THE COURT: Just explain that, about the instrument.

THE WITNESS: The departments in the weather bureau just recently they had a change in anemometers. With the old anemometer registering wind velocity would not register the true wind velocity; there was too much of an error, so on January 1st they installed what is known as the three cup anemometer, practically similar in construction with the old four cup, which records very closely to the known true velocity of wind movement, so we have substituted the three cup for the old four cup.

BY MR. HALL:

THE WITNESS: We have a method of computing the difference of what the old cup registered and this on the new anemometer. The storm, November 22nd 1912, 70 mile maximum velocity, is equivalent to the 57 miles on the three cup anemometer. On January 2nd 1913, maximum velocity 70 miles, is equivalent to 57 miles per hour on the three cup. January 14th 1921, maximum velocity 64 miles per hour, equivalent to 52 miles per hour on the three cup. The extreme velocity shown on our old records made with the old four cup anemometer, the record velocities are: November 22nd 1912, maximum velocity and the extreme velocity of 76 miles per hour, an equivalent of 61 miles per hour on the three cup. January 2nd 1913, extreme velocity, 78 miles per hour, equivalent to 63 miles on the three cup. January 14th, 1921, ex-

treme velocity 76 miles per hour, equivalent to 61 miles per hour on the three cup.

Q. And the wind on January 11th 1928, with the three cup, which registered 62 miles per hour, would be equivalent to 77 miles an hour with the old four cup?

A. Yes, sir.

Q. Do your records indicate that the storm on January 11 1928 did more damage and so forth to things that this other?

MR. LOBLE: Just a minute—

THE COURT: Well; he can state it. You can verify it on cross examination if necessary.

A. In my opinion.

THE COURT: Indicate from the records.

THE WITNESS: The records don't show as much damage reported.

THE COURT: Very well.

MR. HALL: You may cross examine.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: Since January 1st 1928 the department has been using the three cup anemometer. Prior to that time it used the four cup.

Q. I am going to ask you if you will, in accordance with the detailed statement made by your department, go over the maximum velocity of the wind on January 11th 1928 as it appeared on the three cup anemometer, and what it would have been on the four cup anemometer.

A. How much it would be? Which velocity do you want?

Q. The maximum.

A. On the three cup is 52 miles per hour; that would represent 64 actual velocity on the four cup.

THE COURT: The maximum is, what?

THE WITNESS: Maximum 52 on the three cup, representing on the four cup 64 miles per hour.

BY MR. LOBLE:

THE WITNESS: The maximum velocity on the three cup on this date was 52, and if we had been using the four cup which we had previously used in our office it would be 65. I assume that, if we had been on January 11th 1928 using the four cup which we had been using on other dates, we would have had a maximum velocity of 64 miles, assuming those deductions are all right. Assuming that on January 11th 1928 we were using the four cup anemometer instead of the three cup, the extreme velocity would read a 77 mile wind; that would be the highest wind mile that we had; the maximum velocity would be a higher velocity of the wind that night than we had had, so that the record would show, using the figures of 62, the record would show we had a minimum velocity of 64 and an extreme velocity of 77; that is true. On January 14th 1921, using our records of that date, the maximum velocity at that time was 64 miles and the extreme velocity was 76, so on January 14th 1921 the velocity of 64 miles was the

same velocity as occurred on January 11th, 1928. The extreme velocity of the wind mile was 76 as against an extreme velocity of 77 on January 11th 1928. On January 7th 1913 the maximum velocity of the wind at that time was 70 miles as against 64 on January 14th 1921, as against 64 miles on January 11th 1928; that is correct. The extreme velocity on January 2nd 1913 was 78 miles, as against 76 miles on January 14th 1921, as against 77 miles on January 11th 1928. On January 2nd 1912 the extreme velocity was 70 miles as against 70 miles per hour also on January 2nd 1913 as against 64 miles per hour on January 11th 1928; that is correct. The extreme velocity of the wind on January 2nd 1912 was 76 miles, as against 78 miles January 2nd 1913, as against 76 miles on January 14th 1921, as against 77 miles on January 11th 1928; that is correct.

Q. We find then, taking the wind storm on January 11th, 1928, being the wind storm involved in this case, that there was one other wind storm that equals it in velocity and two others that exceeded it?

A. The maximum velocity.

Q. That is true, isn't it?

A. Yes.

THE WITNESS: So far as the extreme velocity is concerned there were two occasions, January 14th 1921, and November 22nd 1912, when the extreme velocity was 76 as against 77 on this particular date, January 11th 1928; that is true. In

other words the extreme velocity on these two occasions, that is, basing the wind mile, was simply one mile per hour less than it was on January 11th 1928. One mile per hour less is scarcely noticeable; you could not tell it from your observation. As to extreme velocity on the 2nd day of January 1913 we have an extreme velocity on that date of 78 miles as against 76 miles on this particular date.

Q. So that, so far as extreme velocity is concerned—

THE COURT: Well; don't repeat it; that shows for itself.

Q. Will you Mr. Maughan kindly take that record of January 14th 1921 and read from your notes what is there reported as to the character of the storm?

A. Strong and high winds this date caused slight damage to numerous skylights, windows, signs and signboards and board fences.

THE WITNESS: No notes are written for January 2nd 1913. November 22nd 1912: A wind storm the most violent on record passed over the station in the early morning. From 4:45 a. m. until 6:30 a. m., the wind blew with a minimum force of 40 miles. During this time much damage was done around town to windows and frail structures. The new Catholic Cathedral that is nearing completion was probably damaged most, the roof of this building being damaged in many places by falling scaffolds. That was November 22nd 1912.

Q. Now will you turn to the record of January 11th 1928, the date in question. I would like to call attention to the last line of the entry on January 11th 1928, the following: The maximum velocity is the greatest since January 2nd 1913, November 12th 1912, and January 14th 1921. That is your record, is it not?

A. Yes, sir.

RE-DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: You ask me to state what effect this wind of January 11th 1928 had upon the new instrument that night which had been put in there on January 1st: After midnight the wind put the instrument out of commission like with a frozen bar; in other words the spindle that it whirls about on got heated and there was no further movement regardless of the force of the wind. You ask me if this wind of January 11th 1928—whether the records show it as intermittent or gusty wind: Our records don't show gusty

RE-CROSS EXAMINATION: BY MR. LOBLE:

Q. Your records show your anemometer stopped at what time January 11th—As a matter of fact it didn't stop on January 11th?

A. It was simply up to the time until the time it stopped. The station anemometer stopped at 2:30 a. m. on the 12th of January.

Witness excused.

DOCTOR B. C. BROOKE being called as a witness on behalf of the defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is Ben C. Brooke; I am licensed to practice medicine and surgery in Montana; I have been engaged in practice here 32 years—

MR. LOBLE: We admit the doctor's qualifications.

THE WITNESS: I am acquainted with the plaintiff, Elroy Houle; I have seen the injuries he sustained to his hand January 11th 1928; I saw them the first time at St. Peter's Hospital, Helena, Montana; I remember seeing a small molecular burn on the legs, arm and hand, a severe burn over the index finger. The burn on the hand was a spotted burn where the current had leaked out in places, not as if you took hold of a hot iron, but something like multiple spots. I saw him since then; it was approximately three months ago; I am not sure exactly. At that time I found the condition of the burn apparently healthy; there was very little destruction; there was some scar tissue; that's all; the movement of the fingers did not seem to be impaired in any way, he didn't say so. At that time he claimed some numbness in his index finger; that was the only thing that bothered him at all; there was no pain; just numbness. It is my opinion that in the course of time

that numbness will permanently disappear; some numbness may remain therein; very little. I think that will not seriously interfere with the use of his hand because there is no paralysis of the nerves or the muscles in the index finger.

Q. Now as to a person who has had such a burn as he had, how about keeping him at the hospital, a person being burned as much as that, should be in the hospital?

A. I had a case two months ago, a kid who had an awful burn with metal on the index finger and the palm of his hand, and he was all healthy; he wouldn't go to the hospital.

MR. LOBLE: I don't think that is material, what some man would, or wouldn't, do; he said someone wouldn't go to the hospital?

THE COURT: I think the jury will understand.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: I am regularly employed physician for the Helena Light and Gas Company and have been for about thirty years. You ask if I attend all their cases, legal and medical: The legal is turned over to Gunn, Rasch and Hall.

MR. LOBLE: That's all.

Witness excused.

FRED SHERIFF being called as a witness on behalf of the defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is Fred B. Sheriff; I live at Helena, Montana and have lived here approximately thirty years. I recall the night of January 11th, 1928.

Q. What occurred, if anything, at your house on January 11th, 1928?

MR. LOBLE: Object to that as incompetent, irrelevant and immaterial, not within the issues of this case.

THE COURT: Do you propose to make that material?

MR. HALL: Yes.

THE COURT: Overruled. It is preliminary.

MR. LOBLE: Exception.

A. It was a very hard wind that night I recall; blew the chimney off the house.

MR. LOBLE: I would like to move to strike that as not a proper question, not responsive to the question; not proper.

MR. HALL: To prove this wind and the weather, and the destruction that it did.

THE COURT: I think so. He may answer. Overruled.

THE WITNESS: You ask how long the house had been constructed: Well, that part of the house was rather old, but the chimney was about five or six years old; I had a new fireplace built there. Yes, we did have other property damaged in which we were interested out at the ranch at Sieben. As

far as I know this was a general wind all over this vicinity. You ask if I had occasion to go out to see what was the matter when the chimney blew over: I didn't go out; I got up to see what was the trouble, found out, and the chimney hit the barn, knocked the plaster off the ceiling.

Q. You have lived here for thirty years. In your experience with that, and other winds, what have you to say whether that wind in this locality was an exception.

MR. LOBLE: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. LOBLE: Exception.

A. I should say quite an extraordinary wind.

THE WITNESS: You ask if it was a steady wind or gusty wind, blowing intermittently: I can recall it had a gusty effect in a kind of a way; it was rattling the storm windows intermittently.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: It was quite a wind storm. I don't know if we had worse. I don't know what the velocity of the wind was. The only thing that made me think it was unusual wind storm was because it blew down the chimney. I haven't any idea of the velocity of the wind in comparison with this storm or that storm. I was not here in 1912 when the wind blew the roof off the Catholic Church as it was being constructed; I think I was

not at home? I would not know whether that was a worse windstorm than this.

Witness excused.

JOHN MITCHELL being called as a witness on behalf of the defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is John Mitchell; I live at 17 Montana Court; I have lived in Helena since 1882; my business is that of sheet metal worker. I recall the occasion of January 11th, 1928 when some damage was done to the roof of the state capitol; I worked on it.

Q. How many lights, what space, did the roof of the state capitol have blown off at that time?

MR. LOBLE: May I have a general objection to all of this testimony? I don't want to interrupt the witness.

A. Well, these had to be taken out altogether; there was eleven lights, ten by twenty; eleven lights ten feet by twenty feet had to be taken out on account of the wind. That span had been standing there on that roof since about 1900, somewhere along there.

Q. You have lived here forty years, or thirty years, since 1882. What have you to say as to whether that was a regular wind, or ordinary wind in this locality?

MR. LOBLE: The answer says an unprecen-

dented wind quite unusual. An ordinary wind is not.

THE COURT: We will hear it. Overruled.

A. It was out of the ordinary. It was a severe storm.

THE WITNESS: I would not say that was a usual wind.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: I would not say there have not been other storms like that; there may have been other storms as severe and more severe; I would think so.

Witness excused.

HENRY EICKMEYER being called as a witness on behalf of defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is Henry Eickmeyer; I live at 1809 Missoula Avenue; I was raised here in Helena; I am 33 years old; I hold the position of Chief Fireman in Helena. I recall a fire out near Broadwater on the night of January 11th 1928 and in my capacity as fireman I went out there. The wind storm was an extraordinary and unusual one. You ask what difficulty we had in trying to handle the hose when we got out there: Well; it would blow back; every time you would

stand there you couldn't stand still; you turn the hose pressure toward the wind it would spray it all over you. I do not recall ever having experienced any worse wind during the time I have lived here.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: The time of the fire was 6:10; when we got back to the station we had to go back on to Twelfth Avenue; there was two fires at the same time, one at 10:20 and one at 10:25; went out on Eleventh Avenue across Warren. The fire at Broadwater was earlier in the evening, 6:10, and the wind was blowing then. There might have been greater wind storms than that one; I was living here in 1921, from January 14th 1921, and lived here January 2nd 1912, and lived here November 22nd 1912.

Witness excused.

HARRY LYLE being called as a witness on behalf of defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is Harry Lyle; I live at the State Nursery; I have lived in Helena practically all my life; I am about 26 years old; I work out there at the State Nursery and worked there January 11th 1928; I do recall the fire we

had out there that night; the fire started in the tie plant. I called the fire department out because our equipment was useless; we had a fire truck at the plant but could not handle it. You ask what I have to say, having lived here for twenty odd years, as to whether this was an ordinary wind in this locality or an extraordinary wind: In my opinion it was a very high wind and kind of high velocity. I do not recall any other wind which in my opinion here in Helena was as severe and gusty as this one was.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: This State Nursery is four or five miles out there in the canyon; the wind comes right down the canyon, right through the canyon, mountains on both sides, the mountains are not very high, but they are there; the wind is coming through from the north to the northwest; it was not coming up the canyon; it was coming down the canyon, or more from the north side; at any rate we were getting all the wind. I could not say that conditions out there that night were somewhat different than the residences in Helena. I have been over around Helena in my experiences and I know this is a thickly populated district; I have been here for twenty years. There is nothing that recalls the storm of January 14th 1921 to my mind, nor the one of January 2nd 1913, nor the one of January 2nd 1912. The reason I recall this one so vividly is because I was out in it. I do remem-

ber the time the roof blew off the Catholic Church. I don't remember whether the wind on that occasion was of greater velocity than this, I have no record of it.

RE-DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: The way I remember it was I remember hearing reports. You ask if I remember hearing of the scaffolding being up there blew down: The Cathedral was in process of erection just then.

Witness excused.

ROY FLEMING being called as a witness on behalf of defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is Roy Fleming; I live in Helena; I have been here since 1918; I am engaged here with the Mountain States Telegraph Company and hold the position of wire chief. I recall the night of January 11th 1928 when we had a wind storm here.

Q. What if any damage did that storm do to your poles or wires in and around Helena?

MR. LOBLE: Object to that as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. LOBLE: Exception.

THE COURT: It may be as far as throwing some light on this case here.

A. We had a total of 37 cases of wire trouble.

THE WITNESS: That did not include any poles being broken down as we had several poles on Lamport Street, east of the Capitol. You ask me what I have to say since I have been here in 1918 whether this is as severe or the most severe storm that I recall: Well, it was a very severe wind. As to whether it was a usual wind in this locality or extraordinary, I would call it an exceedingly high wind. I can't recall, off-hand, any that was as severe since I have been on the job here in Helena.

Q. And what have you to say as to whether that was an extraordinary amount of damage?

MR. LOBLE: The same objection, and exception.

A. Well, that is in that particular kind of trouble; it is a lot of trouble.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: I have been here since 1918. You ask how many cases of trouble I remember of the storm of January 14th 1921, and if I have any records: Our records are destroyed at the end of three years; I have not any records that were used in 1921, nor of what happened in 1913, nor 1912. You ask, having been here in 1921, did I occupy the same position that I do now: No, I was just board man. I could not say whether we had in

January 1921 as many cases of trouble as 37; we no doubt had some wire trouble; whether as great I don't know. I said we had two or three poles blown down on the Lamport line which is this side of where Broadway turns out to the capitol, one report at Seaver Park, and one at Kenwood; they were light poles. You ask if the telephones in this city are big substantial ones and the light poles not so good: We always had good poles, cedar poles. As to whether they are not so heavy or big, it depends on their use. As to whether they were about ready to be taken down and new ones substituted, we might have expected it; we had no reports; we made inspections occasionally and replaced from time to time in these localities. I couldn't say whether we had any wires down; I knew we had trouble; I couldn't say whether any wires ~~were~~ dropped to the sidewalk.

Q. Whether a wire might drop on the sidewalk might depend largely on the manner of its insulation, with a wire carrying high voltage, one side is not insulated and it becomes wet, or where it comes in contact with the pole might be torn a little by the wind and the wind drops it off?

MR. HALL: Object to that. This witness has not qualified on electricity; he is a telephone man; this is not cross examination.

THE COURT: He is not put on as an expert. Objection sustained.

MR. LOBLE: Exception.

Q. The telephone, as far as your record shows

on January 11th, 1928—the telephone wire at 411 North Ewing—you have that record on Ewing Street—were in this condition?

A. I can't say.

Q. You haven't any report showing the phone was out on any of these localities?

A. I haven't looked it up.

THE COURT: Your next witness.

Witness excused.

CHARLES A. BERNIER being called as a witness on behalf of the defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is Charles A. Bernier; I live at 720 Breckenridge; I am working for the Helena Gas and Electric Company and have been connected with it eighteen years; I have charge of the gas and electric department. That has to do with the installation and maintenance of wire of various kinds, putting in position and things of that kind. I am familiar with the line between Eighth Avenue north of the east side of Ewing Street. On January 11th 1928 there were five wires upon the cross arms upon this line between Eighth Avenue and the Alley immediately north of the east side of Ewing Street; they were all electric light wires; there were three primary wires and two arc wires. You say that Section 2697 of the Revised Codes of Montana provides

that wires must be on the cross arm spaced fourteen inches apart. I have measured the distance to determine how far they were spaced, the space between these wires, and it was fourteen and a half inches, so that was more than the minimum required by state law.

Q. If the wire is installed and insulated wire is being used, do you know what the statute requires you to use?

MR. LOBLE: I don't think he should give the man an examination.

THE COURT: Don't lose time with him asking about the law. Put the question.

Q. The state statute provides that insulated wire is used that it must have a triple braid weather proof cover. What kind of wire did you have out there?

MR. LOBLE: Just a minute. I object to that as not a correct statement of the law as defined by asking him what kind did he have. You have to have insulation.

MR. HALL: Oh, no; you don't.

THE COURT: Get the statute.

MR. HALL: Yes; I will get it.

THE COURT: If that is shown—

MR. HALL: The statute says, when insulated wire is used—

THE COURT: Very well, Proceed. Objection overruled.

MR. LOBLE: Exception.

Q. What kind of wire did you have?

A. Triple braided weather proof wire.

Q. And the state statute does not make provision for size?

MR. LOBLE: Object to him asking what the state statute is. It doesn't.

THE WITNESS: You ask what kind of wire was out on those poles at that point: The size of the copper, was No. 6 American Wire Gauge, and B and S. Gauge, hard drawn copper wire; that was the kind of wire put on those poles out there; that is the standard wire that is used for electric wires of the company and is provided for by the Department of Commerce of the United States for the purposes of the kind, and voltage of that kind.

I went out there after this Houle boy had been injured when advised of the fact that this wire was down out there. You ask if I cut down the primary wire that I understood had caused the injury: I cut down the wires, yes. The primary wire was broken in one place. That break was approximately twelve feet from the pole in the alley on the north side of Mr. Loble's house, and the balance of the wire was a continuous wire on the pole across Eighth Avenue on the south. I cut off a piece of that wire on either side of the break where the wire broke in two. These two pieces of wire are the two pieces of wire I cut off on each side of the break.

(Same marked as defendant's exhibit No. 1.)

THE WITNESS: From the appearance of these two pieces of wire where they separated I could

not possibly tell what caused the break. The two ends of the wire that have a kind of running appearance as against the other two ends shows the current went between them and melted the copper to such extent they are beaded through. With a wire where 2000 volts were passing through, if that wire was broken in two there would be no burned ends; but probably two burned ends. You ask whether that wire broke from coming together, two wires, or by short circuit, or whether broken by the wind, or by some falling object striking it: I don't know what caused the break. As to how high these wires are maintained from the ground on the poles: At the pole it will be approximately about twenty-six or twenty-seven feet at the pole itself, and then we have a sag of about two feet where there is a span; it varies with the span; the span between the two poles was 166 feet. The book of the Bureau of Standards of the United States calls for a No. 6 wire sufficient for the voltage these wires carry for any distance to 175 feet leaning over. The pole north of the alley that runs alongside of Mr. Loble's house was renewed about three years ago in February or March. When a pole is renewed and new arms put up the wires are all pulled up tight; that is, to the standard; we have to put them in ship-shape. As to copper wire of this kind, No. 6, its life should be indefinite, any wire out today, unless something unusual happens.

As to when I first learned that there was trouble on Ewing Street with wires on the night of January 11th, 1928, Mr. Loble called me and told me a man had been injured on the wire and he wanted to have the current turned off; he said then the man was in his home, and he wanted me to have the current turned off, and I told him I would take care of it immediately. I called the Plant to find out where the men were working and the condition of any trouble that might have been there, and I found that he had sent the men out on several jobs, and unable to get them, I think, at that time. The man I called was Mr. Keller; he is what we call the Sub-Station man.

Q. When you called him, did he advise you any wire had been down on Ewing Street prior to that, any arc wire.

MR. LOBLE: Object to that; object to any conversation between him and an employee; and objected to as hearsay.

THE COURT: Objection sustained.

THE WITNESS: Yes, I did know of some other wire being down in that vicinity when I called him; not from conversation. I asked him what was the trouble or apparent cause of trouble, and he said Arc Circuit 5-2, meaning that the wire had been broken and he called that emergency. This arc wire ran down there.

Q. Upon the line that is coming off the circuit there. Did you take any further steps towards having anything else done at that time?

A. Nothing in regards to having the wire cut out.

THE WITNESS: I again heard from Mr. Loble shortly after that; he was very excited that time and he said we must have the current turned off, that it was still sparking and on fire, when, for the first time, I realized there was some other wire besides the arc wire that was causing trouble; I then called up the Plant and told them to kill the wire, and he did so. The reason I know that is because I am on the same circuit and immediately my lights went out. Then I got in my car and went to the place where the break occurred, climbed up the pole and cut off the wire. Just as I got through there was another of our men came there who knew about this; just as I came down off the pole, Mr. McCann, my trouble man, kind of hollered to me to look out for a live wire; Mr. McCann had been notified of my first call and he was reporting on that. I figure the time I got out there was about eleven-thirty I would claim. When I got there and after I cut that wire I went into Mr. Loble's house and Mr. Loble was up with the boy. I don't recall seeing the doctor there then; I don't recall seeing Mrs. Houle there; I think Mr. Houle was there. I did notice the condition of the hand that was burned.

Q. What did the burn indicate to you, as an electrician—You have seen a number of burns, have you, from electric wires and so forth? Was there

anything about that burn to show how it might have been burned?

A. It was blistered. The burns I have received, and others I have seen, too, were more as if you had hold of a hot poker; more of a searing action, spotted; it is not a continuous burn; several spots around on the palm of the hand.

THE WITNESS: You ask me to explain that, that it was a burn from the wire, and how it could occur: Well, the way I explain that, he didn't get the full force of the current; that it must have been reduced in voltage in the insulation of the wire; that is, the covering on the wire, and the current that came out and burned him came out through the insulation of the wire that was wet. That night we were having a great deal of trouble, and from about six-thirty somewhere after that, until away early in the morning about three of the linemen were out, the entire force of linemen, so that the man at the sub-station, when he got word of difficulty or anything, he had to locate these men at the places where they were at work. It is rather difficult to say how many cases of wire trouble of different kinds we had that night; we had so many that I did not keep an accurate record of it knowing we had cases of primary trouble, primary wires coming down, poles down, innumerable light voltage wires. As to how the amount of trouble that night compared with the wire trouble in the ordinary time of year, we

had as much that night as we practically have all year.

Q. Do you know of damage done to other property besides your own wires and so forth?

MR. LOBLE: The same objection.

THE COURT: Overruled. He may answer.

A. In placing up the circuits, going over the wires, we could see the damages that had occurred, street lamps blew down; telephone wires hanging down, and signs, even smokestacks blown over.

THE WITNESS: With reference to the sagging of wires and what the regulation is as to the amount of sag you can have in the wire over a 75 foot span, say of 90 degrees, it is about three feet I think; about thirty inches to two feet. I have not got my book.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: As to what is the best type of insulation for wire of that character, we use the wire that is regularly entered by the various association. The best type of insulation for the wire we have is weather proof wire;it is made of cotton woven over the wire and bituminous compound. Oiled linen and paper covered are not used for outside wires.

Q. Now, Mr. Bernier, let me ask you if the trouble up there with this particular wire and others in that vicinity isn't this: That the wire is not insulated for some distance from the top of the cross arm, and that, as a consequence when it rains

and the pole becomes wet, that the wire is heated at the pole and finally drops in the wind. Isn't that the trouble?

A. No.

THE WITNESS: This wire up in around 411 North Ewing street was inspected approximately two years ago; it was inspected by the line foreman, Mr. Scneider; I think it was inspected along in February or March two years ago, February or March of 1926. I have no personal knowledge of what the condition of the wire was at that time. There was no wire that dropped in 1926. As to what if anything we did to the wire in February 1926 which dropped January 11th 1928, we worked on the pole, put on crossarm, pulled up the sag that might have been in the spring. You ask after they did that whether this wire was inspected and if I know that myself: Nothing except that no work had been done on the circuit previous to or since up to the time we had trouble in 1928. Between February 1926 and January 1928, nothing had been done on this wire; no inspection except the usual inspection made on traveling about the streets which is a common practise of everyone in the office to glance at the wires to see what happened. In other words any of the men going around look at the various wires to see whether or not they are in a safe condition; they have at least in the last year and a half I would say, and check in the conditions surrounding them. We also had a man go all over our primary wires, outlining

where they were and what streets they were on and noting those and the alterations that should be made. I could not give you the exact date when that primary wire that dropped January 11th, 1928 was inspected, if inspected at all, between February 1926 and January 11th, 1928. It was inspected by Mr. Art Quinn. Yes, I know he inspected the wire; I have no personal knowledge of the condition of the wire at that time. Yes, we have a record of calls that may come to us advising us of the faulty condition of the wire; we have a log book, as we call it, on which is recorded the date and time when the call came in, name of the person, location and nature of the trouble, and also the person who received the call; we have that log book here on the desk. You ask if it is not a fact that on two different occasions prior to January 11th, 1928 we were not called and advised by Mrs. Loble that the wire in front of the house was not insulated and that at night, sitting in front of the house she would see it spark: I have been back several months and do not find any such records. I do recall the night I came to your house, January 11th, 1928.

Q. Do you recall Mrs. Loble saying to you in the presence of other persons there substantially as follows: This wire had finally come down; I have told you about it in the past two years; you didn't do anything about it.

A. She said something to that effect.

Q. And you didn't respond. Now you have the

record of the particular night, meaning January 11th, 1928, of someone calling you up and advising you of the wire being down. You have that record?

A. Yes.

Q. And that is here, isn't it?

A. Yes.

THE WITNESS: I say the type of insulation we have, the type we should have, is triple braid weather proof.

Q. As a matter of fact, isn't it true, Mr Bernier, that not only up at the locality we are speaking of, but that throughout this town, at the court house, outside of this window that you can see from this courtroom and every place you might want to choose, that you can look at your cross arms and find they are not insulated at the cross arms, and that in many places between the poles they are not insulated, and the insulation is worn?

A. The insulation may be worn off.

Q. If the court would give you a moment and permit you to go out, you could see that on this corner?

A. I couldn't say.

Q. The result is this: These wires not being insulated, in other words, the bare wire being there, if they flop together in a heavy windstorm, you will then get your short, or have your wire burned out? The insulation protects you?

A. This insulation protects to a certain extent.

THE WITNESS: In other words, if the wires were insulated on the poles every place you have

much less likelihood of the wires being burned off by the other. I have been up lately in the same locality we are referring to, 411 North Ewing. You ask if it is not a fact that even now and since January 11th, 1928, between the post that I referred to at the alley in front of your residence and on down to Ninth Avenue that those wires in there are likewise non-insulated: There may be spots, or two.

Q. So that even though you may have your spacing increased, as counsel states in the state law, fourteen and half instead of fourteen inches, the spacing is not much value when you have wires fourteen and half inches apart that are uninsulated and will come in contact with one another and likely cause breakage and break? That is true?

A. No. The spacing is important.

THE WITNESS: Even though fourteen and a half inches apart, if the wire is uninsulated, if the wind is of sufficient velocity to flop them together, you are more likely to have a drop in the wire than otherwise. You ask why the primary fuses did not blow out when the wire was grounded: There is no fuse on the circuit; there is what we call a circuit breaker to take the place of fuses and does shut if this is interrupted three times; that is what we call a circuit breaker. No, that circuit breaker does not advise us of a break in the wire; it advises everybody there of a break in the main someplace. This would show us the prim-

ary wire, a wire of 2300 voltage, was having difficulty, that there was trouble some place there. We have a record to show what it means.

Q. I assume someone else keeps that record at the shop?

A. Yes. It is automatic.

MR. HALL: We haven't it here; I intended to go into that.

THE WITNESS: You ask if at the time we got notice from our automatic breaker were were advised that on the east side there was wire trouble: We had wire trouble all over; there was a good many out all over. The time we got our first information through the automatic device was about 10:50 I believe, and the time we finally turned off the juice so that there was no juice going through this boy, or going over this boy was approximately 11:30, the time I found my man; I don't know the exact time. If everything had been all right there this record would not have shown trouble there at 10:50, if everything had been going on all right. In connection with turning this off, I was advised that you had called the trouble department; you likewise called me. You did not request me to turn that off and it wasn't turned off the first time, no, sir; It was a short time later when you called me back and wanted to know why I hadn't turned off this juice from the live wire; I then called down and he killed the circuit. No; when I got there the wire was dead; it was dead before I got there.

THE COURT: Anything further? Any redirect?

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: This chart which you hand me is a record of the amount of current flowing and the total current at the sub-station.

MR. HALL: Now, before I forget about it, I make formal offer of these two wires offered as defendant's exhibit 1.

MR. LOBLE: No objection.

MR. HALL: I will ask this be marked.

(Paper marked defendant's exhibit 2)

THE WITNESS: You ask me to refer to defendant's exhibit 2 and tell you when we had the first trouble on the circuit: Yes; it would indicate there was trouble on some circuit in here about 10:55 or 10:50; then, later on, it shows there was another circuit out about 11:10 or 11:15.

(Paper marked defendant's exhibit 3)

THE WITNESS: This is a record of the volt meter which keeps the presure that is kept on the circuit of voltage; those records were made automatically by machines there. Looking at that, it shows an interruption about 10:50 or 10:55, a string of voltage, and then again, about 11:05 or 11:10 or 11:15, right close together at that time. You ask if those indicate wire down, or broken or just indicate some wire disturbance: Some wire disturbance; that is, something off. At 10:50 I first learned there was trouble; it didn't show the

wire was down, but there was some trouble. When Mr. Loble first called me, and I called up the substation, he then told me that the arc wire was down at 10:50, and I shut off that wire. The disturbance which shows here wasn't until about 10:50, and that is what I refer to, and it was later than that when Mr. Loble again called me up, a few minutes after eleven, that I first knew there was another wire, or arc wire; that was done by this other disturbance at 11:15 or 11:20.

Q. And immediately on this you—

THE COURT: I can't see the materiality about all that; the mischief was done. What is the materiality of all that?

MR. HALL: I expect counsel to indulge in some stuff before the jury on that.

THE WITNESS: I was asked on cross examination about a conversation with Mrs. Loble when she asked if she hadn't called me up about two and a half years ago; she did ask some questions—she made a statement rather than ask a question, and I made no answer; I could not answer without the records. After that I went down and made a careful examination, went to considerable trouble going back for seven months, and could find no such record recorded.

(At this point, with the usual admonition to the jury, court adjourned until 9:30 to-morrow morning).

MORNING SESSION, Friday July 27th, 1928.

THE COURT: Case on trial. Proceed.

MR. HALL: I would like to recall Mr. Maughan for one question I overlooked asking him yesterday.

WILLIAM E. MAUGHAN being recalled as a witness for the defendant testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

Q. Mr. Maughan, you were on the stand yesterday, a witness on history of the Bureau?

THE COURT: Yes, yes, he was. Proceed with the direct question, what ever it is.

Q. What does your record show, what hour of the night of January 11th, 1928, the extreme velocity was registered?

A. Extreme velocity was registered 10:38 p. m., maximum 11:38 p. m.

Witness excused.

C. A. BERNIER, a witness for the defendant.

RE-DIRECT EXAMINATION, Continued, BY MR. HALL:

THE WITNESS: My last answer was that I had examined our permanent record which is here in the courtroom and found no complaint in such record for seven months back. You ask me to explain to the jury, briefly, how records are kept at night: The calls that come in come to the Operator and he at that time records them on a tab, called the emergency orders, and immediately calls

the line crew and sends them out, and when the repair is made he immediately cancels that order; orders than cannot be completed that evening are allowed to go until next day because not severe enough are then sent to the office the following morning and recorded on our logbook. You say you believe I testified on cross examination that Mrs. Loble said something about making complaint a year or two ago about these lights out there: That was in the report to the sub-station which would be attended to immediately and no report would be made on our logbook. It is correct that there are places around Helena where wires run through trees or come in contact with something where the insulation was worn off.

Q. State whether it is a fact that in may places in Montana and elsewhere that wires are installed in cities that have no insulation at all?

MR. LOBLE: Object to that as immaterial and incompetent; no probative value.

THE COURT: What is the purpose?

MR. HALL: The purpose is to show that insulation is one method that is not used everywhere, and other places maintain that, as we will show by the United States Bureau of Standards.

MR. LOBLE: If other persons are negligent it would not make any difference to this defendant. They are required to use the highest degree of care possible.

MR. HALL: You found the statute here this morning doesn't require insulation; the Bureau of

Standards make provision for insulation, and without that it is optional with the company whether they have insulation or not on the overhead wires.

THE COURT: Well; it seems to be you are willing to go outside of the pleadings. The court has no objection. Overruled.

A. Uninsulated wires are used, and used here in Helena.

Q. Are they permitted under the Bureau of Standards of the United States?

A. They are.

MR. LOBLE: I didn't get a chance to object to that. I should like to object on the ground—

THE COURT: What has the Bureau of Standards got to do with it? You said they permitted. What have they to do with it?

MR. HALL: Well; they lay down a standard of safety, adopted by the bureau, as we will show by another witness, an expert, as co-value of electrical works, printed and given, showing this company the values of all standards laid down.

MR. LOBLE: Move to strike the answer on the ground I did not have an opportunity to object upon the grounds noted.

MR. HALL: Department of Commerce, Bureau of Standards, George K. Burgess, Director. Safety rules for the installation and maintenance of electricity, subject of communication lines. Notebook of the Bureau of Standards No. 10, dated April 15th, 1927, out of the United States Printing Of-

fice, is the book of reference and is one that lays down the standard.

THE COURT: As far as showing the practice it is admissible, but I know of no authority of the United States to frame standards for anybody. Motion will be denied.

MR. LOBLE: Exception.

Q. Now the two wires—

THE COURT: I think you went all over that yesterday.

MR. HALL: There is one question in view of the cross examiantion brought out.

THE WITNESS: You ask if I can tell from the wire where they broke off or were burnt off whether there was any insulation on the wire or whether the insulation burned off: I would say the wire at this place had insulation over its full length up to the time the break occurred. If a wire is installed, a new wire, and the insulation triple braided on the wire, and that wire carried 2300 volts became broke and wet a person would receive a shock.

Q. In other words—

THE COURT: Don't repeat. Don't cross examine.

THE WITNESS: If the wire is insulated and a gusty wind brings them together, if wet they will spark. That is true of a gusty wind more than a straight wind. The sag out here of these wires at this particular place is approximately two feet.

Q. And what is the minimum sag under the Book of Standards and so forth for a span of 174 feet; I think you will find that on page 218.

MR. LOBLE: Object to that as incompetent, irrelevant and immaterial; no probative value in this case.

THE COURT: Unless this so-called Book of Standards states the rule and it is followed out it is immaterial. He may answer subject to motion to strike.

A. The minimum sag, triple braid weather proof solid copper wire, No. 6 in size, at the temperature of ninety degrees is 16.8 inches for a span of 175 feet; at a temperature of sixty degrees it is 13.6 inches.

MR. LOBLE: Move to strike the answer.

Q. That is the minimum sag?

THE COURT: Just a moment. He has answered it. Don't repeat.

THE WITNESS: That is the minimum sag throughout the country, of wires and so forth.

RE-CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: Of the five wires on that pole this would be the second one inside of the sidewalk; what we call the primary wire. You ask what kind of fuses were at the end of the wire at that time: We have circuit breakers at the plant. There were no fuses up there at the corner of Sixth and Rodney that night; that copper wire was fastened to the insulator on the pin, the regulation insulator, porcelain or glass. When the wire

dropped it would have to be live unless it became short-circuited; you have to operated the circuit breaker at the plant.

Q. If you had at the corner of Sixth and Rodney the explosive fuse then—you have heard of that?

A. Yes.

Q. —attached to this primary wire and the wire had dropped down to the ground, happened to become grounded, the fuse would blow out and become dead?

MR. HALL: We object to that we haven't gone into that; we have simply went into the question of insulation and complying with the standards.

THE COURT: You have restricted yourself very narrowly in your complaint. The objection is sustained.

MR. LOBLE: Exception.

THE WITNESS: In reference to complaints that are made I went back for probably more than seven months to see whether complaints had been made that this wire wasn't insulated. Complaints could have been made of the condition of the wire and still not have been recorded in the complaint book. We did not record in our complaint book the complaint you made on the night in question because the complaint was corrected that night. We have no record at all of your complaint. The complaint made by Mr. Cummings is not recorded in the complaint book.

THE COURT: Next witness.

Witness excused.

WILLIAM KELLAR being called as a witness on behalf of the defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is William Kellar; I live at 24 North Rodney; I work for the Helena Gas and Electric Company; I have worked for that company a matter of thirty years. The position I was occupying with the company January 11th 1928 was operating the sub-station; I have worked in that position about three years, and I worked there about twenty years. During that evening when I was working as sub-station man, if complaints come in during the night I repaired them if possible; as a rule we always take care of them; I send out a crew that takes care of and repairs them; I send the line crew out on the line. As far as possible that crew took care of any complaints that night.

(Paper marked defendant's exhibit 4.)

THE WITNESS: This, defendant's exhibit 4, is the original slip that I kept the night of January 11th 1928 of complaints that came in; that shows I received a complaint of some trouble on Ewing Street; it appears there as 411 North Ewing; I have got that marked there and all others that come in that night; that is, reports which came in that night which was necessary to take care of, 57 of them Main Street; these are the most important that come in all evening; that is, lights went out

in the house. I received the complaint of trouble on Ewing Street from Mr. Loble; he told me that somebody had got hurt and was in his house on the bed and wanted me to kill the circuit. At the time he told me that I had already learned of trouble on Ewing and had killed the circuit, the east side arc circuit; there is a large voltage on this. The time I got that information and killed that wire was 10:50. Shortly after that Mr. Loble called me up, between 11:15 and 11:20 I should say. I did not shut off any circuit when he told me that. The reason I did not do so was because it involved many things that I knew nothing about, and, also, I wanted authority from the superintendent to do so because I didn't know the conditions. We got lots of complaints about circuits—

THE COURT: Well, well; let us not take up time on that; it is not material at all.

THE WITNESS: I did not at that time know whether this person had been injured by the wire cut off at 10:50 or some other wire. I did get this call communicated by Mr. Loble and I referred him to Mr. Bernier and then, in a few minutes after that I got another communication from Mr. Bernier.

Q. Did you at that time advise him you had cut the wire off, at 10:50?

MR. LOBLE: Object to that.

THE COURT: Sustained.

THE WITNESS: Shortly after that I got another communication.

Q. What did you do then?

MR. LOBLE: Object to that as hearsay.

THE COURT: Objection sustained.

THE WITNESS: After that I got a communication from Mr. Bernier to shut off the wire; that was the east side primary wire. If those things on this sheet I have referred to were not attended to that night and the emergency crew could not attend to them, it is turned over be me the next morning to the office.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: I went to work at four o'clock in the afternoon on January 11th 1928. You ask me to show you on this sheet the complaint made by Fred L. Cummings, 53 North Warren in regard to the wire he testified about, Twelfth and Thirteenth on Ewing. I believe that is in; it shows his first call came in at 10:26, after that I didn't keep the time. You ask if I kept record of the time about 10:50: That is the arc light; we have to make notes of that. Coming to this next notation, I don't have notation of the time the call was made but I know the time it was. On one notation I have 10:26 and again 10:50. I imagine the third call on Twelfth and Thirteenth and Ewing was Mr. Cummings; I haven't the name; it was after 10:26 because his first call came 10:26, and the next was between 10:26 and 10:50. I don't know if I had this wire talk from Mr. Cummings but the man called on the phone. I don't answer

any names. He did tell me his name and told me about the condition and that it should be taken care of. You ask me what is my particular function up there, and duty: It is to take care of all troubles that may happen on the line and keep the machinery operating.

Q. When anyone tells you that a person has been hit by a live wire and is in bed suffering from that injury, is it the policy of your company you should first call the superintendent before you discontinue the live wire?

MR. HALL: Object to that question because the man injured was in the house; it is immaterial.

THE COURT: You objected to it and the court sustained it, What was done afterwards is of no moment in other words. The objection is sustained.

Q. Why didn't you turn off the circuit instead of this arc wire line? You simply turned off the arc wire at 10:50, did you not?

A. Yes, sir.

THE WITNESS: You say: And at that time you didn't investigate to find out if the primary wire was down: It wasn't giving me any trouble; it didn't start until eleven o'clock; I was phoned and told that wires were sparking.

Witness excused.

MR. LOBLE: I would like to be permitted, in connection with the Witness Bernier, to make an offer of proof in view of the fact he testified on cross examination — on direct examination about

the construction and installation, and asked about the fuses connected with this particular wire. He testified on direct examination about the insulation of the wire and general construction as being in accordance with the standards; I should be permitted to show the fuse connected with this wire is of a type to be thrown out.

MR. HALL: That is objected to.

THE COURT: Objection sustained.

WILLIAM STUSSEY being called as a witness on behalf of defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is William Stussey; I live at Butte; I am connected with the Montana Power Company; they operate an electric plant at Butte and in a great many places throughout the state. I have been connected with the company since 1900. I hold the position with them now of Electrical Engineer in the capacity of Superintendent of Power.

I heard the testimony here as to the voltage of this wire involved here as 2300 volts, and that it had a span of 166 feet, and the spacing at the cross arms of fourteen and a half *feet* and a sag of twenty-two inches, and that the wire was insulated triple braid weather covering.

Q. State whether or not those are the standard devices, safety devices.

MR. LOBLE: Just a minute. Object to that as assuming something not yet shown, that this wire was so insulated. The testimony shows it was partly uninsulated.

THE COURT: Yes. It is overruled.

A. The standard equipment by electric companies generally in Montana and elsewhere; those dimensions come within the safety code as far as the statutes of Montana are concerned with regard to the law.

Q. Now, under the Montana statute, under your operations, is it necessary at all to have wires of this character?

MR. LOBLE: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Objection sustained.

Q. A gusty or intermittent wind, a severe gusty or intermittent wind, will that cause wires to come together more frequently than where it is a steady wind?

MR. LOBLE: Objected to as something not shown in the evidence.

THE COURT: Objection overruled.

MR. LOBLE: Exception.

A. It will.

THE WITNESS: You ask, why: There is a certain frequency and vibration that any wire may assume depending on sag and span, and the wind being in a gust may naturally cause it to vibrate and come together. With the wires fourteen inches apart, if you had a steady wind all the

time it would keep the wires apart at the same distance.

As far as the life of No. 6 copper wire suspended between two poles is concerned, it is indefinite. If this wire has insulation such as is called for under the statute of Montana; that is, triple braid weather proof wire, fourteen or fourteen and a half inches apart, a gusty wind will bring these wires together and the insulation, if wet, will cause sparks, and if for some cause they break and lay on the ground any person coming in contact with them will get burned. Insulation is not intended for the safety to human beings; it has a question of money included, and the valuation of installation for voltages of 2000 and over in the construction of electric supply lines; it is used on lower voltages to prevent the wires from coming together, short circuiting and thereby interrupting the service in that line of 2000 volts. The primary or direct wire is copper. It is no*r for* protection of people who might come in contact with it by climbing up and getting hold of the wire. You ask me to examine this wire, defendant's exhibit 1, and state whether that indicates it was broken off at some place where the insulation was worn off, or at a place where it was insulated at the time of the break: This wire appears to have had insulation on it as far as this point where the insulation is now. If a wire breaks off with a 2300 voltage it would burn the ends if it was off an arc. I would say this was pulled apart.

Q. Did your company have any damages to poles or wire in the vicinity of Helena from the storm of January 11th 1928?

MR. LOBLE: Objected to as incompetent, irrelevant and immaterial.

THE COURT: He may answer.

MR. LOBLE: Exception.

A. Yes, sir; a great deal of trouble; we had some wires down, poles down, wires blown together; trees blown into the line, and the like of that. I have some records, not a great many.

THE WITNESS: We, in Butte and other places, use a great deal of wire.

CROSS EXAMINATION: BY MR. LOBLE:

THE WITNESS: I have not seen this wire at all that fell; only these pieces.

Q. Assuming that this wire was not insulated close to the post and likewise not insulated along trees in there, is it a fact that the wire of the type not so insulated hitting against other wires that run along and slide on it is liable to break?

MR. HALL: We object to that. Nothing to show that this wire broke at a place not insulated.

THE COURT: He may answer.

A. No.

THE WITNESS: From experience, insulation is not necessary. It is a question among engineers whether insulation for 2000 volts is necessary; in some cases we do it; in some cases we don't. As to why we do it, what we do it for: I told you

where wires of 2000 volts are usually insulated at places for the purpose of preventing the wires coming together for safety, and temporarily causing short circuits and having the service discontinued. Yes, we have in our plant more insulated wire than uninsulated wire in 2000 volts.

Q. If it is not desirable, why do you do it?

A. Different character of installation.

Q. All right. In connection with the wires of this company.

MR. HALL: What size wire?

MR. LOBLE: This particular wire.

A. What is the question? I didn't get it.

Q. I am asking you this: Wouldn't it be better to have those wires insulated, from the standpoint of wires and maintenance, for to have protection for walking under them, than uninsulated?

A. It doesn't make a great deal of difference.

Q. It might, or might not?

A. Yes.

THE WITNESS: I have seen the wires around; some are insulated, and some are not. Yes, it is an additional expense to have insulated wire, considerable. It is more economical to put up bare wire and there are some advantages. So far as this wire is concerned, I don't know where it came from. If it was taken off another wire that was insulated it would show like that. This is insulated wire.

Witness excused.

A. T. SCHULTZ being called as a witness on behalf of defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is A. T. Schultz; I hold the position of General Manager of the Helena Electric and Gas Company; I was connected with the company since December 31st 1921; I am a graduate engineer since 1912.

The number of wires on this pole is five; they are all electric wires, no telephone wires. I heard the testimony of Mr. Bernier and also of Mr. Stussey. The wire, poles and arms, sag, and insulation are the standard appliances, all the way through, used by electric light companies generally throughout the country. I would say from the appearance of the break in these two wires, defendant's exhibit 1, that the insulation was O. K., and the burned insulation was due to the break. As to what was the cause of the breaking of the wire twelve feet from the pole, it might be something through the air; might be a fault in the wire. Nobody could tell. If there was a fault in the wire there was no way of discovery, absolutely out of the question. As to the life of the type of copper wire hung up here, it may last for years and years; practically indefinite. The primary purpose of insulating the wire is to protect the copper from the weather.

Q. Will that wire, insulated with the proper

insulation, if it got broke from some cause and fell on the ground, 2300 volts, prevent coming in contact with it and being burned?

A. It is always cheapest to use insulated wire, the same as for power.

THE WITNESS: You ask if a person does receive a burn from insulated wire, from my experience in handling electricity, will it be a different kind of burn than naked wire: Naked wire will sear like a poker, and through insulation will spark and blister.

As to the records of complaints; we keep a record of all complaints in this record book. Complaints made at night received at the sub-station, if dangerous, may be taken care of, or if it may be passed out—somebody without light—may be carried over until the next day, no danger. If somebody calls up the sub-station man and says: I see a spark, or something wrong, a spark indicates no danger whatsoever and the man would not cut out the current. This primary current down here on Ewing Street is the current connected with the east side and with St. Peter's Hospital, and if the current were shut off and an operation was being carried out at St. Peter's Hospital it would put them in danger also. I was called out that night. The wind was very gusty; you could not stand against it; when the wind hit you you would have to move faster than a walk; it was a very gusty wind. The damage I saw the next day was the house was blown off Mount Helena; damage suf-

fered at the Veterans Bureau; a wall blown down; the Marquee at the Placer having glass blown out; the Masonic Temple sign having considerable glass blown out, and several other things; street lights blown out and glass around the streets when I got home.

CROSS EXAMINATION: BY MR. LOBLE:

Q. There is equipment whereby, if you had that kind of equipment, you could shut off a limited space, and in fact, the shutting off of St. Peter's Hospital wasn't done when you picked up the live wire?

MR. HALL: Object to that question as not within the issues; not material.

THE COURT: Counsel for the defense insisted on bringing it in by the neck. I can see no objection to it. Overruled.

A. There is no equipment made which will cause a circuit to open invariably; it may or may not depend on what the ground condition is near the place, whether it makes a good ground or not.

Q. Isn't it true that you can get such equipment that you could within a limited space, 411 North Ewing Street, shut off the current and still maintain light?

MR. HALL: Object to that, having no knowledge of wire being down until after the wire was down.

THE COURT: For the same reason as before, the objection is overruled.

A. If it was the main line, why, you could not break it; you could on a circuit branch; on the main line you could not; you could not.

THE WITNESS: There is no such equipment. You would not in a big city have to shut off all the juice in a condition of that kind. The city runs on one circuit; this was the circuit on the east side of town. I did say in connection with the wires there that we had the standard equipment, the wires and so forth; it is correct that we have standard construction in connection with these wires. This particular primary wire that fell is connected with the circuit breaker in the sub-station. I don't know whether it is connected with the current generator; I don't know whether this wire goes back there or not.

Q. Do you know, in connection with the fuse, as General Manager of this company, what type of fuses there were that this wire was connected with at Sixth and Rodney, if connected there at all.

MR. HALL: We are going to object to any further line of testimony along that line.

THE COURT: Counsel for defendant made it an issue. Objection overruled.

Q. What kind of fuse is at the corner?

A. I don't know.

Q. Isn't this true: Don't you know as a matter of fact this particular wire connects at the corner of Sixth and Rodney with a fuse box instead of having an expulsion fuse which would kill the wire? You had at that time a copper wire which main-

tains this wire, one that falls on the ground sometimes?

A. The wire may have a section line switch. This is simply a section line; not for the protection of the circuit, cutting off the circuit, but to protect the men who may be working on it.

Q. You could have had modern equipment, equipment of the type known as expulsion fuse, connected at the corner of Sixth and Rodney with this wire?

MR. HALL: We renew our objection. That is not the record, not covered by it.

THE COURT: Overruled.

MR. HALL: Exception.

A. It is not a fuse box; that is a section line switch.

THE WITNESS: You ask if this wire is connected with the fuse box at the corner of Sixth and Rodney and the wire comes upon the ground if it maintains the voltage that it had on the pole: It will not open the circuit; that is something I could not tell. It would not be practically the same; as soon as the wire drops or falls to the ground it drops maybe to half voltage, probably to half voltage.

Witness excused.

THE COURT: Your next witness, if you have one.

E. S. McCANN being called as a witness on behalf of defendant was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. HALL:

THE WITNESS: My name is E. S. McCann; I live at 930 North Warren; I am working for the defendant in this case and for them approximately seventeen years; I was working there on January 11th 1928. The position I occupied then was in the Electric Department, trouble man; in other words, one of my duties was to look after trouble. I was called that night; Mr. Keller called me from the sub-station at a quarter after eleven to go east on Ewing and told me a man tangled up with the wires and to stay there until the line was repaired; I responded at once, and when I got there Mr. Bernier was coming down the street as I crossed; I couldn't see who it was. I said: Get away from these wires. When I got up I saw it was Mr. Bernier; that is the first I knew of this wire being down when I was called by Mr. Keller.

MR. HALL: You may cross examine.

MR. LOBLE: No cross examination.

Witness excused.

MR. HALL: Defendant rests.

AL REYNOLDS being called as a witness in rebuttal was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Al. Reynolds; I am an electrician, a lineman; I followed that occupation for fourteen years; I have worked in Montana, worked in Helena, Polson, Livingston, Chicago, Illinois, and all over the country. I have been engaged in that work during the past fourteen years. I live in Helena, now. I was employed by the Helena Light and Railway Company for one year and four months; after leaving their employ I remained here in Helena.

I heard the testimony here that the equipment of the Helena Light and Gas Company is standard equipment with reference to installation and so forth. You ask me whether it is of that type: It is the poorest construction I have ever seen. There is a type commonly known among linemen and electricians as Hot Towns. Helena is a hot town; I mean by that, it is dangerous.

Q. What are the dangers in connection with it? The wires, for instance, in the vicinity of 411 North Ewing Street?

MR. HALL: We object until this witness shows he knows something about it.

MR. LOBLE: All right.

THE WITNESS: I was working for the company in October 1926. I know Mrs. Loble. I was working for the company in that vicinity in October 1926.

Q. I will ask you whether or not she did not at

that time call to your attention, and the attention of those working with you, and the Light Company, to the wire on the post in question?

MR. HALL: Wait a minute. We object to that unless it is shown this employee, who received this information, and not coming to the boss or some man working out there who was the proper person.

MR. LOBLE: I am showing he was the man doing the construction work around there.

THE COURT: Proceed.

Q. What were you doing?

A. I was taking the secondary wire off a tin roof where the insulation was broken and sparking.

THE WITNESS: I was engaged in this work for the Helena Light and Railway Company; they were my employers at that time; it was my duty to observe the condition of the wire and repair it. My attention was directed at that time to the lack of insulation on the wire on the post which is at this alley in front of 411 North Ewing Street and I went up there and retied the wires. The wire in question in front of 411 North Ewing Street was not completely insulated; there was spots about two feet and a half right at the glass where it wasn't insulated. I retied it. Wire running through trees and that is not insulated is more dangerous and more likely to fall when water is running than wire that is insulated. Uninsulated wire near the cross arms of a pole, connected with the cross arm on the post, the line being on the post wet is more liable to break and fall than when

insulated; it will throw some arc under the glass and knock your wire and if the wire is knocked it weakens the wire; it is in a weakened condition, and, if it is in a weakened condition from the knock on the wire the wire breaks in a wind storm. You say that reference has been made to the fact that it was necessary in order to shut off the juice on the wire in question to turn off all the lines on the east side, or substantially all of them on the east side, and you ask me if that is true under the construction of this company: It is true in this town. From my observation and experience in other towns there is a construction of other type that, when used, it is not necessary to turn off the lights all over town; that is true of primary wires as well as furnishing wires, and that is true in the State of Montana. You say that relative to this wire in question that fell it has been described as the second one from the inside. The first wire outside is the arc wire, coming to your house out towards the street and the next wire is the wire that fell; that is the primary wire. You ask where did that wire connect with, what fuse box: There is a primary cut out on the corner of Sixth and Rodney, and the only other cut out I know of is at the plant, so this particular wire runs from your place on up to Sixth and Rodney where it comes in contact with the primary cut out and fuse box, and from there goes in the plant at the sub-station. I know of a type of fuse known as expulsion fuse. With that type of fuse, when the wire becomes short-

circuited and goes to the ground carrying a heavy load it will explode the fuse and one wire will be killed, or the circuit, whichever is in trouble; so that, if that type fuse had been used in this case, when the wire hit the ground it would have been dead on hitting the ground. During my employment I never saw any fuse used in this box; they are in the town though except what is in this box up here. I installed this box myself and, if I remember rightly it is a copper feed wire, so that a live wire falling on the ground, having copper in the fuse box, remains the same as a live wire. If this wire was 2200 and over, or above, on coming to the ground and in contact with this plaintiff it would be practically the same. In the expulsion fuse we have different kinds of metal, aluminium and lead. These melt and break the current.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: It is a matter of fact this fuse at Sixth and Rodney is more difficult to cut, even if a man has got up there to pull it out.

Q. So that a man would have to go up there to Sixth and Rodney to cut it off; that is the nearest place he may cut it off.

A. I didn't get that.

Q. When the word came into the sub-station of trouble on Ewing, the nearest place to shut it off would be for a man to go up there, cut it off, and pull out the switch?

A. Yes.

THE WITNESS: I said that in some places you can shut off the primary wires without shutting off the whole city. That is not true in Helena; you can't block any one circuit out; there is no particular circuit in Helena that can be blocked out; they can block the east side circuit out. I mean by blocking out, if you have trouble on this street and the circuit comes down that way and goes around that way you can block the circuit out; in other words, if this wire runs down one block or half a dozen blocks, you have to shut the whole east circuit off. I don't know if there is any more than one; they simply shut off on the primary circuit, and this primary is the one the wires lead off to the various houses, and cut it out.

I said I worked for this company a year and four months. During the last fifteen years I worked for some ten or fifteen companies.

Q. Didn't seem to hold a job long anywhere. You didn't come out and stay with the company fifteen or thirty years, like some of the witnesses have?

A. No.

THE WITNESS: It was in the latter part of October 1926 that I worked out there and Mrs. Loble told me there was something wrong with the wire; she said it was sparking up there; she could see it at night; she didn't point out where it was sparking; just the wire, one wire; I did look at it at that time; I did report to the company my attention was called to that. I retied it at that

time. You ask where did I find it was sparking when she thought it was sparking: Well; there was spots about two foot and a half right next to the insulator. The insulator means a little glass pin or bulb up on the cross arm. If that wire broke off later on, twelve and a half feet from the pole, the kid got hurt by that little piece of wire at the top because the pole is 27 feet from the ground, because the piece was still hanging up. If the wire broke twelve feet away, that place had nothing to do with the break twelve feet away, no. I figured at that time that I had fixed it, otherwise I would have reported it to the company and had something else done. No; I did not consider it safe after I got through. No wire is considered safe at any time. In the condition of the town I figured that I had done such a job that it was not necessary to report to my superior. It is true, where wires go through or come up against trees, the wire, or insulation, is knocked down and it is going to spark more often than if there wasn't trees. They do dead work in the winter; they go around and cut the limbs off.

I quit voluntarily here and went into other business; the business I am in is Tire Man; I quit the company in 1927. You ask me if the fuses I put up were put up for sectionalizing purposes and not for fuses: I really don't know; I was called to put them up; I followed directions and put in a cut-out; I really don't know what they were put up for.

RE-DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: The fuse wire is put in there to be blown out. I said I didn't report this under the condition of the town, and I mean I did not report this when told of the wire because it was nothing out of the ordinary; it was the condition all over town; I couldn't remedy it because of the condition of the wire or the condition of the town.

Witness excused.

MR. ADAIR: If the court please, in connection with this case there was a deposition which came in by air mail; it should have been put in in the case in chief and I ask permission to put it in at this time; it is the deposition of Mrs. Loble.

MR. LOBLE: We might call another witness:

MRS. LILLIAN A. JOHNSON being called as a witness in rebuttal was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Lillian A. Johnson; I live at the corner of Sixth and Warren; my husband and I live at the service station. Prior to my marriage I was employed at 411 North Ewing Street; I started work there in June 1925 and quit in 1927. During that period of time I had occasion to observe the condition of the wire of this company in front of the residence; I had seen it sputtering many times. I was present when Mrs. Loble

called this condition to the attention of some employees of the company; I don't remember when it was.

Q. State what, if anything, was told the employees of the company relative to the wires, what the wires were doing?

A. She said it had been sputtering many times.

MR. HALL: We object to that as hearsay, what Mrs. Loble said.

Q. During all the time you were there in 1925 to 1927, is it possible for you to tell the number of times you observed the wires sputtering?

A. Well; four or five times.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: It wasn't very windy when I seen it sputtering. It was windy when I saw it sputtering and saw it sputtering around the pole. That pole sits on the far side of a twenty foot alley and then goes on up between fifteen feet of the first tree, and all I saw of anything on the wire was something white there. I can't recall whether it was windy and when weather, but I can recall that it was the second wire; I am pretty sure; I just looked up and saw that. I did not see which one it was; I don't know whether it was the arc wire or the other.

Witness excused.

NORRIS LANE being called as a witness in rebuttal was duly sworn and testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: My name is Norris Lane; I reside at 402 North Ewing; I was residing there January 11th 1928. I had resided there for more than a month prior to that time. That address is next to 411 North Ewing Street. You direct my attention to the wire between the poles on Eighth Avenue and the pole in the alley in front of 411 North Ewing Street, and ask whether or not within a month prior to January 11th 1928 I observed the condition of this wire: I did; it was snowing that night and there was sparks up close to the pole; it was sputtering; that was within a short time prior to January 11th 1928.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: It was about a month and it was snowing up there, so that I imagine the wires were wet, and I saw this spark on the post next to the alley there right up close to the pole.

Witness excused.

MRS. STEVE TOMCHEK being recalled in rebuttal testified as follows:

DIRECT EXAMINATION: BY MR. LOBLE:

THE WITNESS: I lived in Helena at the time there was a wind storm in which the roof from the new Catholic Church then being constructed was blown off. You ask me from that recollection

and my recollection of January 11th 1928 to state which storm appeared to me to be the greater storm: Well; I thought the one when the roof of the Cathedral was blown down; I thought that was the worst wind storm I ever saw in Helena. I have been living around Helena all the time.

CROSS EXAMINATION: BY MR. HALL:

THE WITNESS: I was not out in either of them. At the time the Cathedral was damaged, part of the roof was blown down and part of the scaffolding; they had just finished the scaffolding all up around the high tower. I could not say if it was the scaffolding and false work around there that caused so much damage. I do not say that was the worst storm because of the excessive damage done to the Cathedral; I know I was more frightened than I ever was before; I was at St. Vincent's Academy simply going to school.

Q. And you got older and then got married; you weren't so much frightened when this storm came?

A. I was married.

Witness excused.

MR. HALL: If the Court please, I have not seen that deposition.

MR. ADAIR: Mr. Milton Gunn is here and has read it.

MR. HALL: Mr. Milton Gunn is not handling the case. I don't know what the answers are.

THE COURT: You will hear the questions asked.

And thereupon Mr. Adair took the witness stand and read the deposition as follows:

(Title of Court and Cause)

Deposition of Charlotte Loble, taken before Oscar Schatte, Notary Public for the State of California on July 23rd, 1928.

BE IT REMEMBERED: That on the 23rd day of July, 1928, before, Oscar Schatte, a Notary Public for the State of California, at the office of Oscar Schatte in the city of Los Angeles, California pursuant to the stipulation hereto attached, personally appeared Charlotte Loble known to me to be the person named as witness for the plaintiff, Elroy Carl Houle, named in said stipulation, and she having first been sworn by me to tell the truth, the whole truth and nothing but the truth, relative to the cause specified in said stipulation did then and there testify as follows, viz.:

Interrogatory No. 1: What is your name. A. Charlotte Loble.

No. 2. Where do you reside at this time?

A. 523 South Westmoreland Avenue, Los Angeles.

No. 3. What relation did you formerly bear to Lester H. Loble of Helena, Montana?

A. His wife.

No. 4. Where did you formerly live and at what address?

A. I lived in Helena, Montana, 411 North Ewing.

No. 5. How long did you reside at the last named address?

A. About seven years.

No. 6. State where you were on the night of January 11th 1928.

A. I was home.

No. 7. State whether or not on January 11th 1928 you observed anything unusual occurring in front of your residence? A. Yes.

No. 8. State whether or not you are acquainted with the plaintiff, Elroy Carl Houle? A. Yes.

No. 9. If you answer in the affirmative state whether or not you saw him at any time on January 11th 1928?

A. Yes.

No. 10. If you saw anything unusual state what it was that you observed on said date prior to your seeing Elroy Carl Houle.

A. I saw a blue light flashing like lightning.

No. 11. If you state that you observed anything unusual in front of your residence on said date, state at approximately what time you first observed such unusual condition.

A. I think about ten-thirty.

No. 12. If you observed any unusual condition in front of your house, and if you saw Elroy Carl Houle, state how long a time elapsed between your first observing said unusual condition and your first seeing Elroy Carl Houle.

A. About half an hour.

No. 13. If you saw Elroy Carl Houle, state where you first saw him.

A. As they were carrying him in the house.

No. 14. Did you observe any unusual condition or conditions existing at the place where you first saw Elroy Carl Houle on January 11th 1928?

A. Yes, I saw a live wire on the ground.

No. 15. State what condition or conditions you observed at the first place where you saw the plaintiff Elroy Carl Houle on January 11th 1928?

A. Well the wires were down and I saw him right on the sidewalk.

No. 16-A. State whether or not Elroy Carl Houle was in your home on the night in question?

A. Yes.

No. 16-B. If you answer the last question in the affirmative describe what you observed as to his condition.

A. He was black and drawn and he lay as if he were dead.

No. 17. State whether or not you observed on January 11th 1928 the line of poles and wires of the defendant company on Ewing Street, carrying and conducting electric current.

A. Yes, the wires were down and broken in front of our house.

No. 18. State whether or not you observed the condition of any wire in said line of the defendant company in the immediate vicinity of your home on Ewing Street on the night in question.

A. Yes.

No. 19. If you did observe the condition or appearance of any such wire, state what you observed in that connection at said time.

A. It was blowing around on the ground—it was down to about fifty feet I think.

No. 20. State whether or not you know of your own knowledge of anyone at or in your house on the night of January 11th 1928, advising the defendant company of the condition of said wire. Please answer this question "Yes" or "No."

A. Yes.

No. 21. If you answer the above in the affirmative, who advised the defendant company of the condition of said wire and what was said.

A. Mr. Loble; I don't remember.

No. 22. State whether or not you know Mr. C. A. Bernier?

A. Yes.

No. 23. About how long have you known him?

A. About four years.

No. 24. State whether or not you know by whom said C. A. Bernier was employed on the 11th day of January 1928?

A. Yes.

No. 25. State whether or not you saw the said C. A. Bernier on the evening of January 11th 1928?

A. Yes.

No. 26. If so where did you see him?

A. In my house.

No. 27. Did you at any time prior to January 11th

1928 observe anything in connection with the condition of said wire carrying and conducting electric current in the vicinity of your home on Ewing Street? A. Yes.

No. 28. State what if anything you observed prior to January 11th 1928 relative to the condition of said wire of said defendant company.

A. Well, you could see sparks flying from the wire.

No. 29. State approximately how long prior to January 11th 1928 you had observed these conditions or condition respecting said wire or wires?

A. I think about two years.

No. 30. State what if anything you did prior to January 11th 1928 respecting said wire calling to the attention of the defendant company the condition of said wire?

A. I called the light company twice and told the linemen once when they were working in front of my house.

No. 31. Did you on January 11th 1928, at the time you saw the said C. A. Bernier, say anything to said C. A. Bernier relative to the condition of said wire of said defendant company prior to the date in question? Please answer "Yes" or "No."

A. Yes.

No. 32. If you say that you stated anything to him, what did you say?

A. I told him I had called the light company about the wire.

No. 33. What did he say, if anything, in response?

A. He didn't say anything.

No. 34. If you answer that you did anything state the number of times that you did anything in connection with calling the attention of the defendant company to the condition of said wire. A. Three times.

No. 35. State exactly what if anything you did each time this matter was called to the attention of the defendant company by you if such was the case.

A. I just called them twice and told the linemen once.

CROSS INTERROGATORIES to be asked Charlotte Loble on behalf of the defendant.

Cross Interrogatory No. 1. Did you prior to, or at the time of giving this deposition, receive any letter, statement or other written communication of any kind from anyone relating to what you were to testify in giving such deposition?

A. No, with the exception of this.

Cross Interrogatory No. 2. If you answer Interrogatory No. 1 in the affirmative, state who it was that sent you such letter, statement or written communication.

A. Hugh R. Adair.

Cross Interrogatory No. 3. Please attach, or have attached to and made a part of your deposition, the letters, statements, or other written communications, if any, that you received.

A. Exhibit A attached.

MR. ADAIR: Exhibit A (Letter on my stationery, dated July 19, 1928).

Mrs. Charlotte Loble,
523 South Westmoreland Street,
Los Angeles, California.

Dear Charlotte:

I wired you today as follows:

ARE MAILING DEPOSITION IN HOULE CASE STOP IMPERATIVE YOU TAKE THIS BEFORE A NOTARY AT ONCE AND RETURN BY AIR MAIL AS CASE IS SET FOR THE TWENTY SIXTH

HUGH R. ADAIR

We are enclosing a deposition herewith. The direct interrogatories are questions we are asking of you and cross interrogatories are questions the defendant is asking of you. Take this deposition immediately to some notary, preferably an attorney. If you desire you might take it before Frank Carlton or Mose Cohen, both of whom formerly practiced in Montana and are in Los Angeles.

Read the questions carefully and answer them as directly as you can. Do not put matters in your answer that are not called for by the questions as answers must be responsive to the questions or it will be stricken out by the Court. In connection with question No. 11, I have talked with other witnesses who were there at your house that night and have been informed that they came from Williams' up to your house rather late as they

were waiting for company to leave, that they got to your house around ten or a little after and that it was about ten thirty when you folks there first observed the flashes of blue light in front of your house that you first thot was lightning.

In connection with questions twenty-eight and twenty-nine I assume it will be difficult for you to remember the specific dates upon which you observed the condition of the wires in front of your house and the specific dates when you notified the company of the condition. Give your best recollection of these things.

Lester has told me that you and he sat on the front porch many times and saw the fire sputtering from this wire and that you were always afraid that your children or some of the neighbor children might be killed by this wire if it should drop. It seems that there was great danger from this wire either killing passers-by or setting the town on fire.

I understand that others also repeatedly asked the company to do something about this wire. If you recall any of your neighbors who so notified the company please wire their names collect.

I am sending you this deposition without any previous consultation with you or having talked with you about the case. I do not know how you will feel about giving testimony in this matter in view of the differences that have arisen since this occurrence and which now exist between you and

Lester but all I care for is simply the true facts as you remember them.

It would seem that what you observed prior to the accident as to the condition of the wires of the Helena Gas and Electric Company is particularly important.

INSTRUCTIONS.

Please follow the following instructions:

1. Immediately upon receipt of the papers take all of them before some notary public, any notary will do.

2. Have the notary swear you.

3. In the presence of the notary answer each question on the page provided therefor beginning on page 4.

4. The answers can be either typewritten or written in longhand. If a typewriter is available is probably would be better to have same typewritten on account of the copies.

5. After the answers are written read same over carefully, correct if necessary and then sign the deposition at the end.

6. Have the notary execute the certificate and affix his notarial seal to the certificate at the end of the deposition.

7. Have the notary address the copy of the deposition including the stipulation to C. R. Garlow, Clerk, U. S. District Court, Helena, Montana.

8. Have the notary endorse on the envelope addressed to Mr. Garlow the following:

"Deposition of Charlotte Loble—Houle vs. Helena Gas & Electric Co."

9. Have the notary place in a second envelope an exact copy of the deposition and mail to Hugh R. Adair, Attorney at Law, Helena, Montana.

10. Have notary place in a third envelope the other carbon copy of the deposition containing the answers and address to Gunn, Rasch & Hall, Attorneys at Law, Helena, Montana.

11. Have all three copies of the deposition sent via Air Mail as the case is set for July 26, and must reach us by ten o'clock on that day.

12. Pay the Notary the fees required. I am enclosing a check for Ten Dollars ($10.00) for the above purpose and if same is insufficient to pay the notary please pay him and advise me and I will send you a check for the difference.

Trusting you will give this matter your prompt attention and with kindest personal regards, I am,

Cordially,

HUGH R. ADAIR.

HRA:AIB.

I, the undersigned, Charlotte Loble, hereby certify that I was first duly sworn, that the above questions were asked me and I answered same as above set forth, and that after said questions and answers were reduced to writing, that they were carefully read over by me, corrected and that the above consists of the answers as given by me to the questions and that the same are true of my own knowledge. (Signed) CHARIOTTE LOBLE.

MR. ADAIR: And the certificate of the Notary is attached.

THE COURT: Anything further?

MR. LOBLE: We rest.

MR. HALL: All right. If the Court please, I wish to make a motion at this time.

THE COURT: The jury may be at ease for ten minutes. Proceed.

MR. HALL: Comes now the defendant at the close of all the evidence and moves the court for a directed verdict in favor of the defendant on the ground that the plaintiff has not proved by any substantial evidence the negligence that is charged against it, and on the further ground that the plaintiff has wholly failed to prove the specific charges of negligence, namely: That the defendant negligently allowed its wire to remain for an unusual time upon the sidewalk after it was broken and after they had knowledge of it being broken. On the third ground that plaintiff has failed to prove any negligence of the company which was in any way the proximate cause of the plaintiff's injury in that they have failed to prove—in that the only negligence they have attemtped to show at all in this case is that the wire was not insulated completely, and have wholly failed to prove that the wire was broken at such a point and failed to prove that the boy came in contact at such a point that was not insulated, and that they have not brought themselves an explanation of the conditions in showing the damage itself and so forth as

to bring the prosecution under the Res Ipsi Loquitur doctrine, and entitles the jury to return a verdict for the defendant.

And thereupon the motion was argued to the court by counsel on both sides, after which:

THE COURT: Call in the Jury.

Thereupon the jury returned into court.

THE COURT: Gentlemen, under the usual admonition to refrain from discussion of the case until finally submitted, you will be excused until 1:30.

AFTERNOON SESSION:

THE COURT: At the close of all the evidence in the case, defendant moves the court to direct a verdict in its favor for that, taking the evidence in the aspect most favorable to the plaintiff, the cause of action alleged by the plaintiff is not proven. That presents a question of law to the court. If the evidence is in conflict, and was sufficient in amount to prove the cause of action alleged by the plaintiff, provided the jury take that view of it, it would be the duty of the court to allow it to go to the jury to determine but, if the evidence, as to any material matter is not in conflict, and taking the evidence in the most favorable aspect a verdict by the jury for plaintiff could not stand in law, it becomes the duty of the court to determine accordingly.

The complaint in this case, as the court several times observed during the trial, of which plaintiff

had notice, is very narrow. It alleges a single specific act of negligence on the part of the defendant and claims that the injury to the plaintiff was due thereto. It charges at the time and place involved in the case, the defendant along the street had an electric wire which carried a dangerous electric currect, if anyone came in contact with it, some twenty-seven feet above the ground. It goes, on in paragraph 13: That at that time and place the wire was dangerous to anyone coming in contact with it. In paragraph 14 it alleges during a given time, after specifying the hour, this wire became broken and disengaged from its fastenings so as to fall to the ground. Now there is no allegation in this complaint, like there was in the case from Oregon which counsel cites there; that the breaking of the wire or apparatus was due to negligent conduct of the defendant, not a particle. In that case there was, and that the defendant negligently allowed the wire to become broken and hang down. Nothing like that in this case. Next, in paragraph 15, comes the charge of negligence, the specific charge contained, upon which the case is tried. Parties choose the ground, plaintiff first; he chooses the ground upon which he tries the case; he charges what he complains of against the defendant so the defendant has notice what to defend against during trial in court. Plaintiff then proceeds to charge this specific act of negligence, that at said time and place; that is, on the street where this wire became broken, in violation of the duty

it owed to the public generally and to this plaintiff in particular, negligently, carelessly and recklessly allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily charged with electricity to be and remain on the public sidewalk on the easterly side of Ewing Street. This complaint charges that the wire was broken. Plaintiff complains of no lack of duty on the part of defendant until after the wire broke, and then complains defendant neglected its duty and negligently allowed the wire to remain there on the walk. As to charges of neglect of duty of that sort it is fair to say that the complaint does not state a cause of action, because where a wire not in itself defective breaks and falls, or if anything becomes dangerous to the public not from any inherent or patent defect, then, in order to make out a case of negligence against the party who owns the instrumentality, it must be alleged by plaintiff, that the dangerous situation that suddenly occurred, by the exercise of care, and diligence would have been known to defendant sufficiently long to repair the same before anyone came in contact with it and was injured. Just as in the case of a city. A city is responsible for reasonable care of its sidewalks. It builds and has its sidewalks in proper condition and in the course of the year a large truck, we will say, runs across the sidewalks, breaks boards out, and someone comes along and thereon breaks a leg. The city is not responsible unless the breakage is brought to the notice of the

city a sufficient length of time that by reasonable care it could have repaired it before plaintiff came along and broke his leg. So, it is a storekeeper's duty to keep his premises in a reasonably safe condition for those who come there to trade. Now, if, in the course of the morning one of the boards in the floor is smashed by the customers in some way, accidentally or otherwise, and another customer comes up and breaks a leg therein, the storekeeper is not liable if he has not had time in the exercise of reasonable care and diligence to know and repair the same. So this cause of action alleged that after this wire was allowed there to remain, this boy walking along came in contact with it and was burned more or less seriously, as the complaint disclosed. That is the construction of this complaint, and that it is the only construction reasonable is demonstrated by the evidence plaintiff introduced, and was simply the fact that the wire was broken and plaintiff came in contact with it, without any effort made to prove primarily any negligence on the part of defendant, or in their original construction. Now the defendant, however, for some reason we cannot comprehend, saw fit to go beyond that issue; began to introduce evidence of standard equipment. That wasn't involved at all in the matter on trial. Nevertheless that evidence was allowed to and did creep into the course of the trial and the plaintiff, in rebuttal, was allowed to combat this.

The plaintiff then made the showing that per-

haps some superiority in appliances would have saved the situation; that perhaps there was negligence in the defendant in not turning off the current when it should, or not supplying an explosive switch which would have turned off the current.

That issue has not been tried out and, if there had been such issue in the complaint it has not been proven. Because the defendant is required to use only such appliances that will make the conduct of its business reasonably safe for others,—not the best nor any particular kind.

As to the evidence: The burden is on the plaintiff to prove—and he endeavored by circumstances to prove it—that this broken wire was on the sidewalk for such a length of time that the defendant thereafter knew it, or in the exercise of reasonable care could have known of it and could have taken it out of the way before plaintiff came in contact with it. The evidence in respect to that is purely circumstantial on the part of the plaintiff; it could not be otherwise, nevertheless, he has this burden to prove the fact.

No matter how good a case you have; no matter how just it is, you must prove the cause of action alleged with a sufficient degree of probability before it is entitled to the consideration of a jury. There is no evidence, no sufficient evidence, which would warrant the jury to say that that wire was broke even ten minutes before this boy came in contact with it. Now it is true that flashes, that several witnesses saw flashes from

twenty to thirty minutes before the boy screamed, flashes seen right there which they thought was lightning, but it appears that wires give off sparks without being broken at all. The testimony of Cummings gave it at 10:40, giving his movements. He again saw after sometime further, perhaps an hour, some flashes of light. He called up the sub-station of the defendant at that time and told him there was probably some trouble over there. But there were five wires there; whether it was this wire or some other wire is simply a matter of guess. We are not allowed to guess in court in a case of the kind which plaintiff has alleged.

Now the evidence introduced shows there was a severe storm that night; I guess everybody in Helena remembers it I know that I got up in the hotel, because I never experienced a more severe storm; it was a severe storm; everybody agrees on that, and it caused a great deal of damage that night to defendant's wires, and other wires and property in and around the city. Under such circumstances it is defendant's duty to take reasonable care to see what damage is done to the wires and repair it as speedily as it reasonably can. Now what is reasonable in the circumstances? Of course the defendant, in handling its business and instrumentalities is bound to a high degree of care. It's witnesses testified—there is no reason to disbelieve them and I have no doubt in my mind that it was so—that during that storm defendant had a great many difficulties. Everybody knows that

in a city like Helena there are many miles of wire; it is impossible to be at all places instantaneously and in a short period of time; it takes time to inspect the wires and for men to go to where something happened. That is the situation here. At the outset, this wire may have been broken a few minutes before this boy was injured; if we put it at the time of the flashes, forty minutes. I am not willing to conceded that it should be left to the judgment of the jury in the circumstances the case and of all of the numerous difficulties of the defendant to determine it would be negligence even if it could be justly inferred that the wire had been down forty minutes, before plaintiff made contact with the wire. But the plaintiff says defendant ought to have turned off the current. That is not the cause of action alleged. No complaint, no charge of negligence against the defendant that it didn't turn off the circuit. Defendant had no notice to come into court and try that. It has not been tried. Evidence was admitted over the objection of defendant upon trial, merely by way of rebuttal to evidence injected by defendant. That is not what we are trying; that is not what plaintiff alleged.

Plaintiff has narrowed his case himself; the responsibility is his. So, on the whole, the court cannot say that there is sufficient evidence that the defendant, on the cause of action set up and tried by the plaintiff, is liable. Defendant had its men out all night repairing. No one knows whether

this wire was broken five minutes or fifty minutes; it is simply a guess. I doubt whether two men can agree on it; simply speculation. Then we cannot hold defendant liable on a mere speculation. It may be unfortunate for the plaintiff that he cannot produce any better proof. He is in no worse situation than the defendant, however, and the court is not willing that in the state of the evidence the jury may put its hand in the pocket of defendant for plaintiff's benefit. When this wire broke he shows it about 10:50 or 11, sometime along there. As the court said, the evidence on the part of the plaintiff, taken as a whole, shows this wire wasn't broken so long before the injury to the boy that in that period defendant should have known, or by reasonable and proper diligence could have known and timely repaired the break.

For that reason the motion will be granted.

MR. LOBLE: Exception to the ruling of the court.

THE COURT: It will be granted.

You will remember, Gentlemen, the Court is responsible for the verdict and it is a mere matter of form and indicates the Court's will; not yours. The Court takes all responsibility for the verdict. The verdict will be entered.

Thereafter the jury rendered its verdict against the plaintiff and in favor of defendant as directed by the Court.

That thereupon the Court ordered that the time for preparing and serving plaintiff's bill of excep-

tions herein be extended to fifteen days. That judgment in favor of the defendant in accordance with the said jury's verdict was made and entered on to-wit, the 30th day of July, 1928.

And now, within the time allowed by law and by order of the court plaintiff presents the foregoing as and for his proposed bill of exceptions in said cause and asks that the same be signed, settled and allowed.

DATED this 10th day of August, 1928.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Plaintiff,
Helena, Montana.

Service of the foregoing proposed bill of exceptions and receipt of copy of same acknowledged this 11th day of August, 1928.

GUNN, RASCH, HALL & GUNN.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, George M. Bourquin, Judge of the above entitled court who presided at the trial thereof, after due notice given to the plaintiff herein, have settled and signed the foregoing bill of exceptions and have ordered that the same be made a part of the record of the said cause. Of its own motion the court has corrected its reasons for granting de-

fendant's motion for verdict—not because very material but in behalf of sense and truth.

Sept. 20, 1928.

BOURQUIN,
Judge.

(Lodged with clerk Aug. 11, 1928.)
(Filed Sept. 24, 1928.)

That on, to-wit, September 13th, 1928, stipulation of counsel relative to correcting, signing and settlement of bill of exceptions was duly filed herein being in the words and figures following, to-wit:

(Title of Court and Cause)

STIPULATION.

It is hereby stipulated by and between the counsel for the respective parties in the above entitled cause that the following corrections be made in the proposed bill of exceptions heretofore lodged with the clerk of the court viz.:

On page 69, line 7, strike the word "Bernier" and insert in lieu thereof the word "Loble" and strike the word "Loble" and insert the word "Bernier."

On page 106, line 10 thereof, insert the word "30th" after the word "the" and before the word "day." And strike the word "August" and insert in lieu thereof, the word "July."

Strike lines 11 to 30 both inclusive, on page 106 thereof;

Strike all of page 107;

Strike lines 20 to 30 both inclusive on page 108 thereof.

It is further stipulated that the above corrections may be made by the clerk of this court.

It is further stipulated that the plaintiff's proposed bill of exceptions lodged with the clerk, when corrected pursuant to this stipulation and pursuant to the defendant's proposed amendments heretofore filed herein is a full, true and correct bill of exceptions as to proceedings had and evidence introduced in said cause, and that the same may be signed, settled and allowed by the court.

Dated this 13th day of September, 1928.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Plaintiff.
GUNN, RASCH, HALL & GUNN,
Attorneys for Defendant.

(Filed Sept. 13, 1928.)

THEREAFTER, petition for appeal and order allowing same were duly filed herein, being in words and figures following, to-wit:

(Title of Court and Cause)

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

Comes now the plaintiff above named and petitioning this court for an appeal herein, respectfully says:

This is an action for damages for personal in-

juries alleged to have been received by an electric shock due to the negligence of the defendant;

That on, to-wit, th 26th day of July, 1928, the above entitled cause came on regularly for trial before the court and a jury; that evidence was there introduced on behalf of both plaintiff and defendant; that after all evidence was introduced the court, on motion of defendant, directed the jury to return its verdict in favor of the defendant and against the plaintiff;

That said jury returned its verdict in favor of the defendant as directed by the court;

That, on, to-wit, the 30th day of July, 1928, the above entitled court gave, made and rendered its judgment in favor of the defendant and against plaintiff, and said judgment awarding costs to the defendant and against plaintiff; that said judgment was thereupon duly entered in said cause;

That said plaintiff conceiving himself agrieved by said judgment and the proceedings had prior thereto in this cause, alleges that certain errors were committed therein to his prejudice;

The reasons for the appeal are set forth in the assignment of errors filed herewith.

WHEREFORE, this plaintiff respectfully prays that his appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of said errors so complained of; that a transcript of the record, proceedings and papers upon which the judgment was rendered,

duly authenticated, may be sent to said Circuit Court of Appeals; that such appeal shall operate as a stay of proceedings under said judgment on the plaintiff furnishing a bond in such amount as the court may direct for such purpose according to law, to the end that said cause may be reviewed and determined and that said judgment and every part thereof be reversed, set aside, and ordered held for naught, and for such further relief or remedy in the premises as the court may deem appropriate.

Dated this 1st day of October, 1928.

LESTER H. LOBLE,
HUGH R. ADAIR,
Helena, Montana,
Attorneys for Petitioner.

Service of foregoing petition admitted this 1st day of October, 1928.

GUNN, RASCH, HALL & GUNN,
Attorneys for Defendant.

ORDER.

IT IS ORDERED that the appeal of the plaintiff in the above entitled action be allowed as above prayed for upon plaintiff's executing a bond according to law in the sum of Two Hundred Fifty Dollars ($250) and that upon due execution, approval and filing of said bond the same shall act as a supersedeas herein.

Dated this 10th day of October, 1928.

CHARLES N. PRAY,
U. S. District Judge.

(Filed October 10, 1928.)
C. R. GARLOW, Clerk.

That on October 2, 1928, plaintiff's assignment of errors was duly filed herein, being in the words and figures following, to-wit:

(Title of Court and Cause)

ASSIGNMENT OF ERRORS.

Now comes the plaintiff above named and makes and files this his Assignment of Errors:

The District Court erred:

1. In granting defendant's motion for a directed verdict in its favor;

2. In directing the jury to return its verdict in favor of the defendant;

3. In giving and rendering judgment against the plaintiff on such verdict.

WHEREFORE plaintiff above named prays that the said judgment and order of said court may be reversed.

LESTER H. LOBLE,
HUGH R. ADAIR,
Helena, Montana,
Attorneys for Plaintiff.

Service of foregoing admitted this 1st day of October, 1928.

GUNN, RASCH, HALL & GUNN,
Attorneys for Defendant.

(Filed October 2, 1928.)

That, on October 10, 1928, bond on appeal was duly filed and by the court approved herein.

THEREAFTER on October 10th, 1928, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to-wit:

(Title of Court and Cause)

CITATION.

United States of America to Helena Gas & Electric Co., a corporation—GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, thirty days from and after the day this citation bears date, pursuant to an appeal allowed herein and filed in the office of the Clerk of the District Court of the United States for the District of Mon-

tana on this date upon the petition of the plaintiff Elroy Carl Houle, an infant by Wilbur Houle, his guardian ad litem, and to show cause if any there be, why the judgment rendered against the said plaintiff as in said appeal mentioned should not be reversed and corrected and why speedy justice should not be done the parties in that behalf.

Dated this 10th day of October, 1928.

CHARLES N. PRAY,
Judge.

Service of the foregoing citation admitted and receipt of copy thereof acknowledged this 12th day of October, 1928.

GUNN, RASCH, HALL & GUNN,
Attorneys for Defendant.

(Filed October 12, 1928.)

THEREAFTER on October 12, 1928, plaintiff's praecipe for transcript of record was duly filed herein being in the words and figures following, to-wit:

(Title of Court and Cause)

PRAECIPE.

To C. R. Garlow, Clerk of the Above Court:

Please prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, and including the following:

Complaint of Plaintiff

Answer of Defendant

Reply of Plaintiff
Minute Entry of July 26, 1928
Minute Entry of July 27, 1928
Judgment
Bill of Exceptions
Stipulation re Bill of Exceptions dated Sept. 13, 1928
Petition for Appeal
Order Allowing Appeal
Assignment of Errors
Bond on Appeal
Citation
This Praecipe

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant.

Service of foregoing and receipt of copy admitted this 12th day of October, 1928.

GUNN, RASCH, HALL & GUNN,
Attorneys for Appellee.

(Filed October 12, 1928.)

(Title of Court and Cause)

STIPULATION RE RECORD.

Pursuant to Sub-division 8 of Rule 23, (C. C. A. 9) IT IS HEREBY STIPULATED between counsel for the respective parties herein that the printed record herein shall contain the following, viz.:

Complaint, answer, reply, minute entries of court of July 26 and 27, judgment, bill of exceptions, stipulation re bill of exceptions dated September 13, petition for appeal order allowing appeal, assignment of errors, citation, praecipe to clerk of the district court for transcript, and this stipulation.

IT IS STIPULATED that a bond on appeal was duly approved by the court and filed herein on October 12, 1928 and that same need not be included in the printed record.

Dated this 15th day of October, 1928.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant.
GUNN, RASCH, HALL & GUNN,
Attorneys for Appellee.
E. M. HALL.

(Filed Oct. 17, 1928.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of .../50... pages, numbered consecutively from 1 to .../50...,

inclusive, is a full, true and correct transcript of the record and proceedings in the within entitled cause, and all that is required, by praecipe and stipulation filed, to be incorporated in said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation on appeal issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of $ 2.20, and have been paid by the appellant.

WITNESS MY hand and the seal of said court at Helena, Montana, this 29th day of October, 1928.

(SEAL) C. R. GARLOW,
Clerk.

By Mae O'Donnell,
Deputy Clerk.

No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

v.

HELENA GAS AND ELECTRIC CO., a corporation,

Appellee.

Brief of Appellant

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant,
Helena, Montana.

Filed.....1929.

.....Clerk.

INDEX

Page

The Facts 2

Question Involved 2

Assignment of Errors 3

Argument 3

Summary 5-12

1. *Test for Determining Motion for Directed Verdict* 5
2. *Res Ipsa Loquitur Applicable* 5
3. *Negligence May Be Presumed from Charged Wires Lying in Street* 7
4-5. *Negligence May Be Alleged in General Terms* 7-9
6. *Motion for Directed Verdict Does Not Challenge Complaint* 9
7. *Complaint Deemed to Be Amended* 10
8. *The Issues of Fact for Jury's Determination* 11

The Pleadings 15
- The Complaint 16
- The Answer 19
- The Reply 20

The Evidence 21
- Defendant's Evidence 21
- Plaintiff's Evidence 22
  - Equipment 22
  - Notice-Discovery 23
  - No Inspection 25
  - Unprecedented Storm 27
  - Deposition of Charlotte Loble 41

Theory of the Case 30
- Counsel's Theory 31
- Court's Theory 36

The Issues of Fact 41

A Case for the Jury 45

Conclusion 51

Page

CASES CITED

Altman v. Atlantic Coast Line R. Co., (C. C. A. 5th), 18 F. (2d) 405 12

Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615 ..... 5, 7, 11, 50

Arkansas Light & Power Co. v. Cullen, (1925 Ark.), 268 S. W. 12 12

Aulback v. Dahler, 4 Idaho 654, 43 Pac. 322 11

Baltimore & O. S. W. R. Co. v. Hill, (1925), 84 Ind. App. 254, 148 N. E. 489 ..... 8, 9

Begert v. Payne, (C. C .A. 6th), 274 Fed. 784 ..... 5, 12

Beman v. Iowa Electric Co., (Iowa), 218 N. W. 343 6

Birsch v. Citizens' Electric Co., 36 Mont. 574, 93 Pac. 940 12

Blackwelder v. Fergus Motor Co., 80 Mont. 374, 260 Pac. 734 ..... 11, 40

Boyd v. Portland Elec. Co., 41 Or. 336, 68 Pac. 810 6

Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576 ..... 12, 20, 21

Brown v. Kansas Natural Gas Co., (C. C. A. 8th), 299 Fed. 463 11

Bryson v. Gallo, (C. C. A. 6th), 180 Fed. 70 ..... 11, 38

Burns v. Holyoke St. Ry. Co., (1925), 253 Mass. 443, 149 N. E. 127 ..... 6, 7

Central R. Co. v. Peluso, (C. C. A. 2nd), 286 Fed. 661 6

Chaperon v. Portland Elec. Co., 41 Or. 39, 67 Pac. 928 ..... 6, 8, 19

Chiles v. Ft. Smith Commission Co., 139 Ark. 489, 216 S. W. 11 9

Cochran v. Davis, 118 Okl. 135, 247 Pac. 65 3

Colusa Parrot Min. etc. Co. v. Monahan, (C. C. A. 9th), 162 Fed. 276 ..... 5, 7, 16, 47

Conrad v. Wheelock, (D. C.), 24 F. (2d) 996 ..... 10, 40

Coolot Co. v. Kahner & Co., (C. C. A. 9th), 140 Fed. 836 ..... 11, 38

Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82, 64 L. Ed. 141 ..... 5, 14

Page

Crosby v. Portland R. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204 ..... 12, 20

Deal v. U. S., (C. C. A. 9th), 11 F. (2d) 3 ..... 8, 17

Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359 19

Dodson v. City of Bend, 117 Or. 231, 242 Pac. 821 10

Donovan v. Chitwood, (Neb. 1928), 218 N. W. 587 10

Dotson v. Louisiana Cent. Lmbr. Co., 144 La. 78, 80 So. 205 ..... 8, 9

Downey v. City of Macon, (Mo.), 6 S. W. (2d) 63 6

Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058 12

Dugan v. Erie County Elec. Co., 241 Pa. 259, 88 Atl. 437 12

Dunagan v. Appalachian Power Co., (C. C. A. 4th), (1928), 23 F. (2d) 395 43

Economy Light & Power Co. v. Hiller, 203 Ill. 518, 68 N. E. 72 12

Fitzgerald v. So. Pac. Ry. Co., 36 Cal. App. 660, 173 Pac. 91 11

Ford v. Wabash Ry. Co., (Mo.), 300 S. W. 769 38

Forquer v. North, 42 Mont. 272, 112 Pac. 439 ..... 8, 17

Fulton Inv. Co. v. Farmers Reservoir & Irr. Co., 76 Colo. 472, 231 Pac. 61 8

Geneva Mill Co. v. Andrews, (C. C. A. 5th), 11 F. (2d) 924 ..... 8, 17

Hart v. Martin, (Tex. 1927), 299 S. W. 520 40

Herbert v. Hudson River Elec. Co., 136 App. Div. 107, 120 N. Y. S. 672 12

Johnson v. Marshall, (1926), 241 Ill. App. 80 ..... 6, 9, 10, 12, 40

Kaemmerling v. Athletic Mining & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574 ..... 4, 8, 9, 15, 17, 22, 32

LaBonte v. Mutual Fire & Lightning Ins. Co., 75 Mont. 1, 241 Pac. 631 ..... 11, 40

Lander State Bank v. Nottingham, 37 Wyo. 50, 259 Pac. 181 10

Lexington Utilities Co. v. Parker's Admx., 166 Ky. 81, 178 S. W. 1173 ..... 7, 29

Page

Lorenz v. Bull Dog Automobile Ins. Ass'n, (Mo. App.), 277 S. W. 596 10

Lykiardopoulo v. New Orleans etc. Light etc. Co., 127 La. 309, 53 So. 575 ..... 8, 9

MacVeagh v. Multnomah County, (Or. 1928), 270 Pac. 502 16

Mayor of City of Madison v. Thomas, 130 Ga. 153, 60 S. E. 461 ..... 7, 29

McCrae v. Beverly Gas etc. Co., 216 Mass. 495, 104 N. E. 365 6

McDowell v. Kiehel, (C. C. A. 3rd), 6 F. (2d) 337.....37, 45

Memphis Consolidated Gas & Electric Co. v. Letson, (C. C. A. 6th), 135 Fed. 969..... 5, 12

Minneapolis Gen. Elect. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345 20

Moglia v. Nassau Electric R. Co., 127 App. Div. 243, 111 N. Y. S. 70 6

Nashville Inter. Ry. v. Gregory, 137 Tenn. 422, 193 S. W. 1053 ..... 8, 9

Norton v. Larney, 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413 11

Novak v. Borough of Ford City, (1928), 292 Penn. 537, 141 Atl. 496 .....6, 12, 44, 45

O'Dell v. So. Ry. Co., 248 Fed. 345 3

Potera v. Brookhaven, 95 Miss. 744, 49 So. 617.....6, 7, 21

Pricer v. Lincoln Gas & Elect. Light Co., 111 Nebr. 209, 196 N. W. 150 12

Quaker City Cab Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327 .....3, 12, 37, 45

Reynolds v. Iowa Southern Utilities Co., (C. C. A. 8th), 21 F. (2d) 958 .....11, 20, 47

Rocca v. Tuolumne County Elec. Power & Light Co., (1926), 76 Cal. App. 569, 245 Pac. 468.....6, 7, 20, 28

Rochford v. Penn. Co., (C. C. A. 6th), 174 Fed. 81..... 5, 14

Salwiecz v. Rutland etc. Corp., (Vt. 1928), 142 Atl. 77 .....6, 11, 19, 49

Sanders v. City of Carthage, (1928 Mo.), 9 S. W. (2d) 813 ..... 7, 36

Page

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680.....5, 7, 10, 16, 34, 37, 52

Schassen v. Columbia Gorge Motor Coach System, (Or. 1928), 270 Pac. 530 10

Schrull v. Phila. Suburban Gas & Elec. Co., 279 Pa. 473, 124 Atl. 141 12

Smith v. Redman, (1927), 244 Ill. App. 434....8, 9, 10, 38, 52

Smith v. San Juaquin Light & Power Corp., (Cal.), 211 Pac. 843 20

Solomon v. Light & Power Co., 303 Mo. 622, 262 S. W. 367 46

Southwestern Light & Power Co. v. Fowler, (Okla.), 249 Pac. 961 .....19, 20, 28

Southwestern Tel. Co. v. Shirley, (Tex. Civ. A.), 155 S. W. 663 6

Southwestern Tel. etc. Co. v. Bruce, 89 Ark. 581, 117 S. W. 564 6

Spaids v. Cooley, 113 U. S. 278, 28 L. Ed. 984..... 41

Spiesberger v. Mich. Cent. R. Co., (C. C. A. 7th), 235 Fed. 864 ..... 5, 14

Staff v. Wobbrock, (Minn. 1927), 214 N. W. 49..... 10

Standard Oil Co. v. Brown, 218 U. S. 78, 30 S. Ct. 669, 54 L. Ed. 939 .....10, 38

Standard Oil Co. v. Cates, (C. C. A. 4th), 28 F. (2d) 718 ..... 5, 15

Stewart v. Stone & Webster Eng. Corp., 44 Mont. 160 8, 17

Stolle v. Anheuser-Busch Inc., 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001 8

Storm Waterproofing Corp. v. L. Sonneborn Sons, 28 F. (2d) 115 15

Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914 D. 905.....5, 11, 20, 34

Tatum v. Louisville & N. R. Co., (C. C. A. 5th), 253 Fed. 898 ..... 8, 17

United Kansas Portland Cement Co. v. Harvey, (C. C. A. 8th), 216 Fed. 316 .....10, 37

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625 .....3, 11, 37, 38, 45

Wallace v. U. S., 16 F. (2d) 309..... 8, 52

Page

Washington-Virginia Ry. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032 ..... 8, 9

Watson v. C. G. W. Ry. Co., (Mo. 1926), 287 S. W. 813 9

Webster v. Richmond Light etc. Co., 158 App. Div. 210, 143 N. Y. S. 57 6

Westerdale v. N. P. Ry. Co., (Mont. 1929). Decided Jan. 21, 1929; not yet officially reported..... 29

Whitney Co. v. Johnson, (C. C. A. 9th), 14 F. (2d) 24 5, 15

Whittaker v. U. S. F. G. Co., (D. C. Mont., Bourquin, J.), 300 Fed. 129 ..... 11, 38

Wright v. Richards & Co., (1926), 214 Ala. 678, 108 So. 610 ..... 6, 7, 32, 46

Zinkiewicz v. Citizens Electric & Ill. Co., 53 Pa. Super 572 ..... 7, 9, 30, 44

OTHER AUTHORITIES

Section 777 Title 28 U. S. C. A. 11, 37

Section 9183 Revised Codes Montana (1921)..... 11

20 C. J. 381 34

No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

v.

HELENA GAS AND ELECTRIC CO., a corporation,

Appellee.

Brief of Appellant

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action for personal injuries by Elroy Carl Houle, an infant, by Wilbur Houle, his guardian ad litem, against Helena Gas and Electric Co., a corporation (R. pp. 2-10). Judgment on directed verdict for defendant entered (R. p. 17) and plaintiff appeals (R. pp. 143-146).

THE FACTS

The plaintiff is a sixteen year old boy (R. pp. 2, 10, 19).

At about 11:20 o'clock (R. pp. 22, 23, 24) on the night of January 11, 1928, plaintiff was walking on the *public* sidewalk on Ewing Street in the city of Helena, Montana, when he came in contact with a live wire "owned and maintained by the defendant" (R. pp. 10, 11).

The wire was on the *public* sidewalk (R. pp. 11, 20, 21, 38-41, 43, 50, 52). It was carrying an electric current of 2300 volts (R. p. 56).

The boy did not know of the wire being on the ground and there was nothing to indicate to him or warn him of its presence (R. pp. 20, 22, 28-30, 31, 32, 40).

Plaintiff was rendered unconscious, seriously burned and permanently injured by the electric current so conducted into his body (R. pp. 20-27).

This suit was to recover damages for the personal injuries so sustained. A trial was had. At the close of all the testimony the defendant moved for a directed verdict (R. p. 132). The trial judge granted the motion and plaintiff excepted to such ruling (R. p. 140).

QUESTION INVOLVED

The question presented is:

Should the motion for a directed verdict have been granted?

ASSIGNMENT OF ERRORS

The District Court erred:

1. In granting defendant's motion for a directed verdict in its favor (R. pp. 132, 140, 146);

2. In directing the jury to return its verdict in favor of the defendant (R. pp. 140, 146);

3. In giving and rendering judgment against the plaintiff on such verdict (R. pp. 17, 141, 146).

ARGUMENT

The granting of the motion for a directed verdict by the trial judge and the entry of judgment for the defendant herein, was, in effect, a finding that plaintiff had not made an *issue of fact* to go to the jury.

Cochran v. Davis, 118 Okl. 135, 247 Pac. 65

If there is any evidence in the case tending to prove the negligence charged,—if the record discloses but a single *issue of fact*, then the court cannot properly direct a verdict for the defendant.

See:

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625 at p. 626

O'Dell v. So. Ry. Co., 248 Fed. 345

Quaker City Cab Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327 at p. 328

Three factors determine what *issues of fact* are presented, viz.: (1) the *pleadings*, (2) the *theory* upon which the case was tried, and, (3) the *evidence* introduced.

The plaintiff in his complaint, alleged the negligence of the defendant in general terms (R. pp. 2-10).

No demurrer or other objection was interposed thereto.

The defendant, in its answer, pleaded (1) the general issue and (2) an unprecedented wind storm (R. pp. 10-13).

The case was tried upon the theory that the doctrine of res ipsa loquitur is applicable (R. pp. 33, 35, 36, 133).

A prima facie case, under this doctrine, is admitted by the answer (R. pp. 10-13).

To explain and refute the presumption of negligence, thus arising under that doctrine, the defendant introduced evidence tending to show that its equipment was standard; that the defect in its wire was latent; that it had no knowledge of such defect; that it had no opportunity to discover or repair the defect and that an unprecedented wind storm caused the wire to be deposited on the sidewalk where plaintiff was injured.

See:

Kaemmerling v. Athletic Mining & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

The plaintiff introduced substantial evidence controverting each of the foregoing contentions and defenses.

Issues of fact were thus presented.

Summary

Appellant's contentions are:

1. The *test* for determining a motion for a directed verdict is as stated in the following cases, viz.:

Begert v. Payne, (C. C. A. 6th), 274 Fed. 784
Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82, 64 L. Ed. 141
Spiesberger v. Mich. Cent. R. Co., (C. C. A. 7th), 235 Fed. 864
Rochford v. Penn. Co., (C. C. A. 6th), 174 Fed. 81
Whitney Co. v. Johnson, (C. C. A. 9th), 14 F. (2d) 24
Standard Oil Co. v. Cates, (C. C. A. 4th), 28 F. (2d) 718

2. The doctrine of *res ipsa loquitur* is applicable.

See:

Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914 D 905
San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680
Colusa Parrot Min. Etc. Co. v. Monahan, (C. C. A. 9th), 162 Fed. 276
Memphis Consolidated Gas & Electric Co. v. Letson, (C. C. A. 6th), 135 Fed. 969
Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615 at pp. 616, 617

Salwiecz v. Rutland Etc. Co., (Vt. 1928), 142 Atl. 77

Downey v. City of Macon, (Mo.), 6 S. W. (2d) 63

Novak v. Borough of Ford City, (1928), 292 Penn. 537, 141 Atl. 496

Beman v. Iowa Electric Co., (Iowa), 218 N. W. 343

Johnson v. Marshall, (1926), 241 Ill. App. 80

Wright v. Richards & Co., (1926), 214 Ala. 678, 108 So. 610

Burns v. Holyoke St. Ry. Co., (1925), 253 Mass. 443, 149 N. E. 127

Central R. Co. v. Peluso, (C. C. A. 2nd), 286 Fed. 661

Boyd v. Portland Elec. Co., 41 Or. 336, 68 Pac. 810

Chaperon v. Portland Elec. Co., 41 Or. 39, 67 Pac. 928

Southwestern Tel. Etc. Co. v. Bruce, 89 Ark. 581, 117 S. W. 564

Webster v. Richmond Light Etc. Co., 158 App. Div. 210, 143 N. Y. S. 57

Rocca v. Tuolumne County Elec. Power & Light Co., 76 Cal. Ap. 569, 245 Pac. 468

Moglia v. Nassau Electric R. Co., 127 App. Div. 243, 111 N. Y. S. 70

Southwestern Tel. Co. v. Shirley, (Tex. Civ. A.), 155 S. W. 663

McCrea v. Beverly Gas Etc. Co., 216 Mass. 495, 104 N. E. 365

Potera v. City of Brookhaven, 95 Miss. 744, 49 So. 617

3. The fact that wires carrying a dangerous current of electricity have broken or become detached from their poles in the street or highway and caused injury raises a presumption of negligence.

See:

Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615

Wright v. Richards & Co., 214 Ala. 678, 108 So. 610

Rocca v. Tuolumne Co. Elec. Etc. Co., (1926), 76 Cal. Ap. 569, 245 Pac. 468

Burns v. Holyoke St. Ry. Co., (1925), 253 Mass. 443, 149 N. E. 127

Sanders v. City of Carthage, (1928 Mo.), 9 S. W. (2d) 813

Zinkiewicz v. Citizens Elec. & Ill. Co., 53 Pa. Super. Ct. 572

Lexington Utilities Co. v. Parker's Admx., 166 Ky. 81, 178 S. W. 1173

Potera v. Brookhaven, 95 Miss. 744, 49 So. 617

Mayor of City of Madison v. Thomas, 130 Ga. 153, 60 S. E. 461

See also:

San Juan Light Etc. Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680

Colusa Parrot Min. Etc. Co. v. Monahan (C. C. A. 9th), 162 Fed. 276

4. Negligence may properly be alleged in *general terms* in cases such as this when the facts pertaining to the causes of the injury are peculiarly

within the knowledge of defendant and are such that plaintiff cannot be expected to know them.

See:

Kaemmerling v. Athletic Min. & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

Deal v. U. S., (C. C. A. 9th), 11 F. (2d) 3

Geneva Mill Co. v. Andrews, (C. C. A. 5th), 11 F. (2d) 924

Tatum v. Louisville & N. R. Co., (C. C. A. 5th), 253 Fed. 898

Forquer v. North, 42 Mont. 272 at p. 280, 112 Pac. 439

Stewart v. Stone & Webster Eng. Corp., 44 Mont. 160 at p. 175

Baltimore & O. S. W. R. Co. v. Hill, (1925), 84 Ind. App. 254, 148 N. E. 489

Chaperon v. Portland Electric Co., 41 Or. 39, 67 Pac. 928

Nashville Inter. Ry. v. Gregory, 137 Tenn. 422, 193 S. W. 1053

Smith v. Redman, (1927), 244 Ill. App. 434

Dotson v. Louisiana Cent. Lmbr. Co., 144 La. 78, 80 So. 205

Lykiardopoulo v. New Orleans Etc. Light Etc. Co., 127 La. 309, 53 So. 575

Washington-Virginia Ry. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032

Fulton Inv. Co. v. Farmers Reservoir & Irr. Co., 76 Colo. 472, 231 Pac. 61

Stolle v. Anheuser-Busch Inc., 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001

Also see cases cited in,

Wallace v. U. S., 16 F. (2d) 309 at p. 312

5. The *general allegations* of negligence contained in plaintiff's complaint are sufficient to properly present all the issues of fact tried, especially in view of the fact that no demurrer or other objection was interposed to the complaint.

See:

Kaemmerling v. Athletic Min. Etc. Co., (C. C. A. 8th), 2 F. (2d) 574

Baltimore & O. S. W. R. Co. v. Hill, (1925), 84 Ind. A. 354, 148 N. E. 489

Smith v. Redman, (1927), 244 Ill. App. 434

Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 87

Chiles v. Ft. Smith Commission Co., 139 Ark. 489, 216 S. W. 11

Lykiardopoulo v. New Orleans & C. R. Light & Power Co., 127 La. 309, 53 So. 575

Watson v. C. G. W. Ry. Co., (Mo. 1926), 287 S. W. 813

Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S. W. 1053

Washington-Va. Ry. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032

Dotson v. La. Cent. Lumber Co., 144 La. 78, 80 So. 205

Zinkiewicz v. Citizens Elec. & Ill. Co., 53 Pa. Super Ct. 572

6. The sufficiency of plaintiff's complaint, not having been tested by demurrer, cannot be challenged on motion for a directed verdict made at the close of the evidence.

See:

Conrad v. Wheelock, (D. C.), 24 F. (2d) 996

Smith v. Redman, (1927), 244 Ill. App. 434

Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 87

See also:

Schassen v. Columbia Gorge Motor Coach System, (Ore. 1928), 270 Pac. 530 at p. 532

Dodson v. City of Bend, 117 Or. 231, 242 Pac. 821

Donovan v. Chitwood, (Neb. 1928), 218 N. W. 587

Staff v. Wobbrock, (Minn. 1927), 214 N. W. 49

Lorenz v. Bull Dog Automobile Ins. Ass'n, (Mo. App.), 277 S. W. 596

Lander State Bank v. Nottingham, 37 Wyo. 50, 259 Pac. 181

7. Evidence having been introduced by both parties in this case with respect to matters which were material, the complaint will be treated as having been amended, when necessary to properly put such matters in issue.

See:

United Kansas Portland Cement Co. v. Harvey, (C. C. A. 8th), 216 Fed. 316

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680

Standard Oil Co. v. Brown, 218 U. S. 78, 30 S. Ct. 669, 54 L. Ed. 939

Norton v. Larney, 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413
Whittaker v. U. S. F. G. Co., (D. C. Mont. Bourquin, J.), 300 Fed. 129
Bryson v. Gallo, (C. C. A. 6th), 180 Fed. 70
Coolot Co. v. Kahner & Co., (C. C. A. 9th), 140 Fed. 836
United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625
Aulback v. Dahler, 4 Idaho 654, 43 Pac. 322 at p. 323
Fitzgerald v. So. Pac. Ry. Co., 36 Cal. App. 660, 173 Pac. 91 at p. 92
Section 777 Title 28 U. S. C. A.
Section 9183 Revised Codes Montana (1921)
Blackwelder v. Fergus Motor Co., 80 Mont. 374, 260 Pac. 734
LaBonte v. Mutual Fire & Lightning Ins. Co., 75 Mont. 1, 241 Pac. 631

8. Substantial evidence of defendant's negligence having been introduced the trial judge was not authorized to withdraw the case from the jury.

See:

Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615
Reynolds v. Iowa Southern Utilities Co., (C. C. A. 8th), 21 F. (2d) 958
Brown v. Kansas Natural Gas Co., (C. C. A. 8th), 299 Fed. 463
Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815
Salwiecz v. Rutland Light & Power Co., (Vt. 1928), 142 Atl. 77

Novak v. Borough of Ford City, (1928), 292 Pa. 537, 141 Atl. 496
Altman v. Atlantic Coast Line R. Co., (C. C. A. 5th), 18 F. (2d) 405
Schrull v. Phila. Suburban Gas & Elec. Co., 279 Pa. 473, 124 Atl. 141
Pricer v. Lincoln Gas & Elec. Light Co., 111 Nebr. 209, 196 N. W. 150
Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058
Arkansas Light & Power Co. v. Cullen, (1925 Ark.), 268 S. W. 12
Herbert v. Hudson River Elec. Co., 136 App. Div. 107, 120 N. Y. S. 672
Economy Light & Power Co. v. Hiller, 203 Ill. 518, 68 N. E. 72
Dugan v. Erie County Elec. Co., 241 Pa. 259, 88 Atl. 437
Boyd v. Portland Electric Co., 40 Or. 126, 66 Pac. 576
Crosby v. Portland R. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204
Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 91
Memphis Cons. Gas Etc. Co. v. Letson, (C. C. A. 6th), 135 Fed. 969
Quaker City Cab. Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327
Birsch v. Citizens' Electric Co., 36 Mont. 574 at p. 581, 93 Pac. 940

The Test in Determining Motion for Directed Verdict

In Begert v. Payne, (C. C. A. 6th), 274 Fed. 784, the court said:

"It is a commonplace that, upon a motion by a defendant for instructed verdict, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound processes of reasoning and applicable principles of law. *The credibility of witnesses is peculiarly for the jury.* If the plaintiff produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, *no amount of contradictory evidence would authorize the trial judge to take the question of its effect and weight from the jury* (citing authority); this rule being subject (so far as material here) only to the limitation that testimony contrary to reason or contrary to natural and physical laws cannot support a verdict (citing authority). A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion, to set the verdict aside. *The test is whether there is such an utter absence of substantial evidence as to make it his duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the court may think the conflict in testimony to preponderate in favor of defendant.* We deem it unnecessary to do more than refer to the decisions of this court (citing same). (Italics ours.)

See also:

Spiesberger v. Mich. Cent. R. Co., (C. C. A. 7th), 235 Fed. 864

In Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82, 64 L. Ed. 141, the Supreme Court reversed a judgment for a defendant, rendered on a directed verdict, saying in the course of the opinion:

> "in order to test the propriety of the peremptory instruction given by the trial judge we must bring into view the facts and the reasonable inference which tended to a different conclusion, and *where the evidence was in substantial dispute, must adopt a view of it favorable to plaintiff;* but of course we do this without intending to intimate what view the jury ought to have taken, had the case been submitted to it." (Italics ours.)

In Rochford v. Pennsylvania Co., (C. C. A. 6th), 174 Fed. 81, it is said:

> "The *credibility* of a witness is peculiarly a question for the jury, under proper instructions by the court (citing authority). Neither is the mere fact that there is a preponderance of the evidence in favor of the party moving for an instructed verdict enough to require the judge to take a case from the jury, even though it might justify a new trial (citing cases). If the plaintiff has produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, *no amount of contradictory evidence will authorize the*

trial judge to take the question of its effect and weight away from the jury (citing cases)." * * * *

"It was the duty of the trial judge, and also the duty of this court, when his action is assigned as error, to give the plaintiff the benefit of every fair inference, which might reasonably be drawn from the evidence by the jury, when guided by sound processes of reasoning and applicable principles of law." (Italics ours.)

See also:

Whitney Co. v. Johnson, (C. C. A. 9th), 14 F. (2d) 24

Standard Oil Co. v. Cates, (C. C. A. 4th), 28 F. (2d) 718

The Pleadings

The only pleadings in the case are the (1) complaint, (2) answer and (3) reply. *No demurrer or motion was interposed* to the complaint.

The pleadings were drafted and the case was tried by both parties (R. p. 33) upon the theory that the doctrine of res ipsa loquitur is applicable.

See:

Kaemmerling v. Athletic Mining and Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

The case "must proceed to the end upon the theory upon which it is constructed."

See:

Storm Waterproofing Corp. v. L. Sonneborn Sons, 28 F. (2d) 115 at p. 117

In MacVeagh v. Multnomah County, (Ore. 1928), 270 Pac. 502 at p. 505, it is said:

> "It is well settled * * * * that, when a cause has been heard upon a certain theory in the trial court, with the acquiescence of the parties litigant, it must be so continued on appeal."

THE COMPLAINT

The complaint, in substance, alleges that plaintiff, while on a *public* sidewalk where he had the right *to be*, was injured by coming in contact with a live wire of the defendant company, then on said *public* sidewalk where it had no right to be.

See:

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680
Colusa Parrot Min. Etc. Co. v. Monahan, (C. C. A. 9th), 162 Fed. 276

The negligence complained of is set forth in paragraphs 15, 18 and 20 of the complaint (R. pp. 6, 8, 9).

The complaint alleges the existence of certain duties owing from defendant to plaintiff, sets forth certain acts and omissions of defendant which caused the injury and, alleges "that all of the acts, omissions and conduct * * * * complained of on the part of the defendant were negligent" (R. p. 9), without defining the quo modo, or specifying the details or particulars of such negligence.

Negligence may be thus alleged in *general* terms.

See:

Forquer v. North, 42 Mont. 272 at p. 280, 112 Pac. 439

Stewart v. Stone & Webster Eng. Corp., 44 Mont. 160 at p. 175

Deal v. United States, (C. C. A. 9th), 11 F. (2d) 3

Geneva Mill Co. v. Andrews, (C. C. A. 5th), 11 F. (2d) 924

Kaemmerling v. Athletic Mining & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

Tatum v. Louisville & N. R. Co., (C. C. A. 5th), 253 Fed. 898

The acts and omissions upon which the negligence complained of is predicated are:

(1) Failure to provide against reasonable and probable contingencies (R. p. 8);

Permitting the charged wire:

(2) *to lie* so near the street as to come in contact with persons traveling thereon (R. p. 8);

(3) *to hang down* so near the street as to come in contact with persons traveling thereon (R. p. 8);

(4) *to be so near* the street as to come in contact with persons traveling thereon (R. p. 8);

(5) *to be upon* said public sidewalk (R. p. 6);

(6) *to remain* so near the street as to come in contact with persons traveling thereon (R. p. 8);

(7) *to remain upon* said public sidewalk (R. p. 6); and,

(8) failure to so maintain and use said wire so as not to injure plaintiff (R. p. 8).

In paragraph XV of the complaint (R. p. 6) it is alleged:

> "That * * * defendant * * * negligently * * * allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily charged with such high and dangerous electric current * * * *to be* and *remain* upon said public sidewalk * * *" (R. p. 6). (Italics inserted.)

In paragraph XVIII of the complaint (R. p. 8) it is alleged:

> "That it * * * was the duty of defendant in * * * operating * * * its said plant * * * *to provide against all reasonable probable contingencies* and not to permit * * * said wire * * * *to lie, hang down, be* or *remain* so near the said * * * sidewalk as to come in contact with persons traveling thereon, * * * and it * * * was the duty of said defendant to so * * * maintain * * * said wire * * * so as not to injure the said Elroy Carl Houle, plaintiff herein, all of which things and duties the said defendant failed and omitted to do and perform" (R. p. 8). (Italics inserted.)

In paragraph XX of the complaint (R. p. 9) it is alleged:

> "Plaintiff further states that all of the acts, omissions and conduct herein complained of on the part of the defendant were negligent and careless acts and the proximate cause of plaintiff's injuries" (R. p. 9).

As was said in Southwestern Light & Power Co. v. Fowler, (Okla.), 249 Pac. 961 at p. 963:

> "The negligence of the defendant was in permitting a condition which sent the deadly current out of its usual zone of travel. It is not material what concurring cause or means set the dangers in motion, *unless the concurring means superseded the negligence of the defendant.*" (Italics ours.)

THE ANSWER

The answer of the defendant admits that the live wire in question was "owned and maintained by defendant"; that it "was broken" and fell to the ground; that plaintiff, while lawfully proceeding along the street, "came in contact with said wire, broken as aforesaid," and that plaintiff was thereby injured (R. p. 11).

A *prima facie* case of negligence against defendant is thus admitted in the answer.

In the recent case of Salwiecz v. Rutland Light & Power Co., (Vt. 1928), 142 Atl. 77, the court said:

> "The Vermont Hydro-Electric Corporation owned the transmission line. Its electricity escaped and injured the plaintiff. The proof of this established a prima facie case."

See also:

Chaperon v. Portland Electric Co., 41 Or. 39, 67 Pac. 928

Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359

Smith v. San Joaquin Light & Power Corp., (Cal.), 211 Pac. 843

Rocca v. Tuolumne County Elec. P. & L. Co., (1926), 76 Cal. App. 569, 245 Pac. 468

Southwestern Light & Power Co. v. Fowler, (Okla.), 249 Pac. 961

Reynolds v. Iowa So. Utilities Co., (C. C. A. 8th), 21 F. (2d) 958

THE REPLY

The plaintiff's reply simply puts in issue the new matter alleged in defendant's answer (R. p. 13).

A Prima Facie Case

The admitted facts and circumstances being such as to raise a presumption of negligence from the occurrence of the accident, under the doctrine of res ipsa loquitur, a prima facie case was made out entitling plaintiff to go to the jury.

See:

Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815

Minneapolis Gen. Elect. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345

Crosby v. Portland R. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204

Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576

Had no explanation or evidence tending to rebut the foregoing presumption been offered, then defendant's negligence would have been established

as a *matter of law* and plaintiff would have been entitled to a peremptory instruction on that issue.

See:

Potera v. Brookhaven, 95 Miss. 744, 49 So. 617

The defendant, however, saw fit to attempt to offer an explanation of the accident and thereupon the question of the defendant's negligence ceased to be a *matter of law* to be determined by the court and became a *matter of fact* to be determined *by the jury.*

See:

Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576

The Evidence

DEFENDANT'S EVIDENCE

At the trial the defendant submitted evidence to overcome the prima facie case against it and to exonerate it from liability. By this evidence defendant sought to explain the injury to plaintiff upon three grounds, viz.:

(1) That its equipment was standard and safe (R. pp. 76-96, 101-110) and that there was a latent defect in the wire (R. pp. 78, 79, 82, 94, 103, 106);

(2) That the defect in the wire arose so recently that defendant could not, by the exercise of proper care, have discovered or repaired it before the accident occurred (R. pp. 80, 81, 88-90, 97-100, 111); and,

(3) That the wire was deposited on the sidewalk by an unprecedented wind storm (R. pp. 56-76, 107, 108).

See:

Kaemmerling v. Atlantic Mining & Smelting Co., (C. C. A. 8th), 2 F. (2d) 574

PLAINTIFF'S EVIDENCE

The plaintiff, to rebut the foregoing, introduced upon three grounds, viz:

Equipment

(1) Defendant's equipment was not standard; its construction was poor and dangerous and by reason thereof the city of Helena is known among linemen as "a hot town" (R. p. 112); these defects were and are patent—so patent they could be seen from the window of the court room wherein the trial was had (R. p. 86); the defect in the particular wire in question was patent; the insulation was defective and worn and in spots entirely missing on the wire in question as long before the accident as October, 1926 (R. pp. 112, 113) subsequent thereto and even at the time of the trial the defective non-insulated spots had not been repaired (R. p. 87);

(2) An expulsion fuse connected to the circuit would have automatically shut off the current as soon as the wire fell to the sidewalk or became grounded and thus prevented the injury (R. pp. 114, 115, 118); no such fuses were provided or in use on the circuit in question (R. pp. 87, 95, 115).

The wire in question had been defective and had been giving off sparks for a long time prior to the accident (R. pp. 116, 117, 120); defendant had been notified of this condition *three* times by Mrs. Loble (R. pp. 127, 85, 112, 113, 116, 118, 119), *once* by Fred Cummings at 10:26 p. m. (R. p. 99) being about *fifty-four minutes before the injury*, next by some one at 10:50 p. m. (R. p. 99) being about thirty minutes before the injury; that notwithstanding, the defendant failed to turn off the circuit or repair the defect.

Electricity was escaping from defendant's wire along Ewing Street as early as 10:26 p. m. (R. p. 99) when the witness Cummings called defendant's trouble station (R. p. 47). Cummings then observed "intermittent flashes, like lightning" from the "wire that was out of order" on Ewing Street in the vicinity of the little store on the corner of Thirteenth and Ewing in the six hundred block and *southward* therefrom toward 411 North Ewing where plaintiff was injured (R. p. 46).

Plaintiff was injured at about 11:20 p. m. (R. pp. 22, 23, 24, 30, 37, 38, 52, 55), being almost an hour after defendant was notified of the defect.

After the plaintiff had been injured the witness Marion Lane followed the defective wire from 411 North Ewing Street to the little store on the corner of Thirteenth and Ewing Streets where the escap-

ing electricity had been observed by Cummings almost an hour before (R. pp. 28, 29).

Marion Lane testified on cross-examination:

> "I rode along down in the car as far as the little store. I do know that was the same wire because I followed it from my house down; *only one wire was down.* There are four or five wires on the poles in front of the house" (R. p. 29).

Again:

> "I did go down and saw no other wire sputtering on the ground. I said I got home a little after eleven" (R. p. 29).

The "intermittent flashes, like lightning" seen by Cummings at 10:26 p. m. and occasioned by electricity escaping from the fallen wire of defendant company were also observed, from about that time until plaintiff was injured at 11:20 p. m., by the witnesses (1) Steve Tomcheck (R. pp. 31-34), (2) Mrs. Tomcheck (R. pp. 37-39), (3) Elmer Williams (R. pp. 39-42), (4) Walter Yund (R. pp. 43, 44), and (5) Charlotte Loble (R. pp. 123-127).

Thereafter Mr. Loble telephoned defendant's substation that plaintiff was injured and requested the operator to kill the circuit (R. p. 98); the operator refused to shut off the circuit and referred Mr. Loble to the superintendent Mr. Bernier (R. p. 98). Loble then telephoned Superintendent Bernier, advising the latter that plaintiff had been injured by the wire and requested that the cur-

rent be turned off (R. p. 80). Superintendent Bernier "called the plant to find out where the men were working," etc., but *he did not order the current turned off* (R. p. 80). Shortly after that Loble called the operator at the plant *a second time* and wanted the circuit shut off but still the operator failed to turn off the current (R. p. 80). Thereupon and again Loble called the superintendent who testified:

> "He (Loble) was very excited that time and he said we must have the current turned off, that it was still sparking and on fire, when, for the first time, I realized there was some other wire besides the arc wire that was causing trouble; I then called up the plant and told them to kill the wire, and he did so" (R. p. 81).

The witness Tomcheck testified that the wire was still alive at approximately midnight (R. p. 54).

No Inspection

The defendant failed to make proper or any inspection of this circuit to ascertain patent defects therein. The defendant's superintendent testified:

> "It was inspected along in February or March *two years ago*, February or March, 1926. * * * no work had been done on the circuit previous to or since up to the time we had the trouble in 1928. Between February 1926 and January 1928, nothing had been done on this wire; *no inspection except the usual*

inspection made on traveling about the streets which is a common practice of everyone in the office to glance at the wires to see what happened." (R. p. 84.)

Again:

"I could not give you the exact date, when that primary wire that dropped January 11th, 1928 was inspected, if inspected at all, between February 1926, and January 11th, 1928" (R. p. 85).

In defendant's circuit along Ewing Street there are only *five* (5) wires (R. p. 95).

Numbered from the inside of the sidewalk, wire number two (2) is the one that became broken and fell to the sidewalk (R. p. 95).

Before operator Keller turned off the current superintendent Bernier called him and "asked him what was the trouble or apparent cause of the trouble, and he said Arc Circuit 5-2, meaning that the wire had been broken" (R. p. 80). The defendant knew exactly where the trouble lay. It knew that on this 5 wire circuit that wire number 2 was in trouble and before any of defendant's employees had arrived on the scene of the accident the current in the 2nd wire was turned off and when the superintendent arrived there the "wire was dead" (R. p. 88).

Defendant's own mechanical automatic device indicated trouble on this wire as early as 10:50 p. m. or *thirty minutes before* the boy was injured

and even then the current was not turned off until at least 11:30 p. m. or *ten minutes* after the injury and *forty minutes* after the automatic device rendered *notice* to defendant of the trouble (R. p. 88).

Unprecedented Wind Storm

The testimony of defendant's own witnesses shows that the wind storm of January 11, 1928, was not unprecedented. The U. S. Weather Bureau records indicate that there were at least *three* precedents for the storm in question (R. p. 57). These records indicate that there had been one other wind storm in which the maximum wind velocity equalled and two other storms where the maximum wind velocity exceeded that of the storm of January 11, 1928 (R. p. 62).

The records further indicate that the extreme velocity recorded on Jan. 2, 1913, exceeded that recorded on Jan. 11, 1928, by two miles per hour and that on two other occasions the extreme velocity approached to within one mile per hour of that recorded on Jan. 11, 1928 (R. p. 63).

Defendant's equipment and wires must be so maintained as to withstand not only fair weather but foul weather as well.

Merely because an injury occurs during a severe storm is not proof that such injury is a result of the storm. The storm may prove to be a concurring cause or means to set the already existing

danger in motion, but that can not relieve the defendant from liability unless this concurring means superseded the negligence of the defendant.

See

Southwestern Light & Power Co. v. Fowler, (Okla.), 249 Pac. 961 at p. 963

When an "unprecedented wind storm" is shown by defendant's own witness to have had three precedents it ceases to be unprecedented. It thereby loses its prestige, claim to fame and effectiveness as a defense. It then becomes merely a "severe storm" such as the trial judge testified to having experienced on the night in question when he "got up in the hotel" (R. p. 138).

Whether the plaintiff's injury was the result of defendant's defective equipment and negligence or whether it was the result of a big wind is a question for the jury to determine under proper instructions.

See:

Rocca v. Tuolumne County Elec. Power & Light Co., 76 Cal. App. 569, 245 Pac. 468

Even though a high wind may have caused the wire to have become disengaged from its fastenings at 10:26 o'clock p. m. when first observed by the witness Cummings, who then notified defendant, still, such fact will not excuse the defendant for its negligent conduct in permitting the charged wire *to be* upon the public sidewalk until the hour of 11:20 p. m. when plaintiff was injured.

Damage done to the wire by a high wind will not excuse the defendant for its negligence in keeping the current turned on after notice of the defect; nor in failing to turn off the current when notified, nor, in the defendant's failure to investigate the trouble and remedy the same until more than one hour had elapsed after it had received actual notice of the dangerous condition of the wire.

The defendant may not close its eyes to the danger of which it has notice. It was the defendant's duty *as a matter of law* to use reasonable care to prevent injury from the fallen wire and to forthwith turn off the current.

See:

Westerdale v. N. P. Ry. Co., (Mont. 1929), decided Jan. 21, 1929 (not yet officially reported)

In Lexington Utilities Co. v. Parker's Admx., 166 Ky. 81, 178 S. W. 1173, at p. 1175, the court said:

> "It is conclusively shown that the light company had notice of the break 20 minutes before the accident. *With knowledge of this fact, there was negligence in failing to shut the current off from the wire.* Knowledge of the break imposed upon the light company the duty of refraining from sending a current through the wire until it ascertained that it was safe to do so." (Italics ours.)

In Mayor of City of Madison v. Thomas, 130 Ga. 153, 60 S. E. 461 at p. 463 the court said:

"If the superintendent of the electric light plant received notice that the wire was down, and the electric current was then on, *he should have instantly turned the current off and kept it off*, until, after due investigation, the report was found to be untrue, or, if found to be true, until proper precautions were taken to prevent danger to persons or property from the fallen wire." (Italics ours.)

In Zinkiewicz v. Citizens Elec. & Ill. Co., 53 Pa. Super. Ct. 572 at p. 575 the court said:

"We need not cite authorities for the proposition that in view of the extraordinary care which such companies are bound to exercise *they would be responsible for the consequences of permitting a live wire to dangle upon the road after notice, actual or constructive, regardless of the causes producing such a condition.*" (Italics ours.)

Theory of the Case

As to the negligence charged there are two theories.

Counsel for plaintiff and defendant had one theory of the case. The trial judge had an entirely different theory of it.

The theory upon which the pleadings were drafted and the case tried by counsel was that the doctrine of res ipsa loquitur is applicable. In accordance with that theory plaintiff's complaint states *generally* the acts and omissions which he alleges to be the proximate cause of his injuries and avers that same were negligently done.

The trial court's theory was that the allegations of plaintiff's complaint are *not general* but that they are *specific* (R. pp. 133, 134); that the complaint "is very narrow" (R. p. 134); that "it alleges a single specific act of negligence on the part of the defendant" (R. p. 134) and that plaintiff's proof is limited and confined to this single specific act, viz: that defendant "negligently * * * * allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily charged with such high and dangerous electric current * * * to be and remain upon said public sidewalk" (R. pp. 36, 37).

COUNSEL'S THEORY

The only times the phrase "res ipsa loquitur" appears in the record it was placed there by defendant's counsel (R. pp. 33, 35, 36, 133).

At the very beginning of the case defendant's counsel admitted his knowledge of plaintiff's theory of the case by stating to the court that plaintiff was "simply relying on the res ipsa loquitur doctrine" (R. p. 33).

By introducing evidence of standard equipment, latent defect, lack of notice and knowledge, lack of opportunity to discover and repair the defect, etc., defendant's counsel further indicated his knowledge of the doctrine and theory on which the case was tried.

If the allegations of negligence in the complaint

were not *general*,—if same were *specific*, why did defendant not confine its evidence to explaining and rebutting the *specific act* charged? Why go outside of the issue made by this *specific act* in presenting its defense?

The answer is obvious.

Counsel knew the complaint alleges negligence in *general* terms and that the doctrine of res ipsa loquitur is applicable.

Defendant's counsel knew the kind and character of defense required by the pleadings in this case and proceeded to and did present the proper and only defenses available to defendant.

See:

Kaemmerling v. Athletic M. & S. Co., (C. C. A. 8th), 2 F. (2d) 574 at p. 581

In Wright v. Richards & Co., (1926), 214 Ala. 678, 108 So. 610, the court said:

> "After plaintiff rested her case, defendants introduced evidence tending to show due care in inspection and management, and good condition of the wire and its insulation at the place of the accident.
>
> "After defendants rested, the plaintiff offered to prove by the witness Cantrell that, prior to and up to about the time of the accident, he had frequently observed the wires, where they ran through the branches of trees along where the accident occurred, 'sparking' and 'spitting fire,' and that the insulation was off. The court sustained objection to this evidence upon the ground that it was not in

rebuttal, holding that evidence of defective condition should have been offered as part of plaintiff's original case. In this the court was in error. *The plaintiff having made a prima facie case of negligence on that issue, the burden was on defendants to proceed with proof of due care.* The evidence of Cantrell was in rebuttal of such testimony." (Italics ours.)

While defendant was content to adopt the trial judge's *erroneous* theory that plaintiff's complaint was narrow and alleged but a single specific act of negligence, for the purpose of moving for a directed verdict (R. p. 132) yet defendant was not so willing to adopt this same *erroneous* theory when it came to making its record and presenting its defenses.

This occasioned the following remarks from the court, viz.:

"What is the purpose?" (R. p. 92).

"Well, it seems to be you are willing to go outside of the pleadings. The court has no objection." (R. p. 93.)

"Counsel for the defense insisted on bringing it in by the neck. I can see no objection to it." (R. p. 108.)

"For the same reason as before, the objection is overruled." (R. p. 108.)

"Counsel for defendant made it an issue. Objection overruled." (R. p. 109.)

See also record pages 35, 36, 100, 101, and 110.

From an examination of the record it will be seen that defendant adopted the correct theory in

presenting its case; that it was in no wise prejudiced in its defense and that it had and received all the benefits of such defense under the theory that the negligence of defendant is alleged in the complaint in *general terms* and that the doctrine of res ipsa loquitur is applicable.

In 20 C. J. p. 381 it is said:

> "The facts that defendant conducts electricity to a certain place; that electricity so employed may escape in such a way as to produce an injury; and that an injury from electricity is actually occasioned in a place where the injured party has a right to be are usually held to constitute a prima facie case of negligence."

In San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 98; 32 S. Ct. 399, 401, the court said, in referring to the doctrine of res ipsa loquitur:

> "When so read it rightly declared and applied the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

In Sweeney v. Irving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, it is said:

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*,—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence. * * * *

"In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; *that they make a case to be decided by the jury*, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. *When all the evidence is in, the question for the jury*

is, whether the preponderance is with the plaintiff." (Italics ours.)

(See also cases hereinbefore cited in paragraph 2 of the Summary of this brief.)

COURT'S THEORY

The trial court adopted the erroneous theory that there is but one single, specific act of negligence alleged in the complaint. However, it must be remembered that this specific act of negligence is then followed in the complaint by other and general allegations of negligence.

See:

Sanders v. City of Carthage, (1928 Mo.), 9 S. W. (2d) 813

After the plaintiff had rested, the defendant introduced evidence of other and different issues in the case. These issues, in the terms of the trial judge, were brought into the case, by the defendant, "by the neck" (R. pp. 108, 109).

They were then met by contradictory evidence offered on the part of plaintiff.

When so met they constitute *issues of fact.*

These issues so brought into the case are in for all purposes. Defendant may not place them in the record for one purpose and then rid itself of them for another purpose.

The defendant's evidence in support of these issues was, for the most part, introduced without objection. In view of this fact the complaint must

be deemed to have been amended, if necessary to properly put such matters in issue.

United Kansas Portland Cement Co. v. Harvey (C. C. A. 8th), 216 Fed. 316, holds that under Rev. St. Sec. 954 (now Sec. 777, Title 28, U. S. C. A.), which permits the amendment of pleadings to conform to the proofs, where evidence was introduced by both parties with respect to a matter which was material, the complaint will be treated as having been amended, when necessary to properly put such matter in issue.

In Quaker City Cab Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327, at p. 328, the court said:

> "Federal courts are very liberal in allowing amendments to prevent a miscarriage of justice."

See:

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625 at p. 627

McDowell v. Kiehel, (C. C. A. 3rd), 6 F. (2d) 337

In San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680, the Supreme Court said:

> "The trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that

question; * * * * effect must therefore be given to the well-settled rule that *where parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review.*" (Italics ours.)

See:

Standard Oil Co. v. Brown, 218 U. S. 78, 30 S. Ct. 669, 54 L. Ed. 939

Bryson v. Gallo, (C. C. A. 6th), 180 Fed. 70 at pp. 74, 75

Coolot Co. v. Kahner & Co., (C. C. A. 9th), 140 Fed. 836 at p. 839

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625

Whittaker v. U. S. F. G. Co., (D. C. Mont.), 300 Fed. 129

Ford v. Wabash Ry. Co., (Mo.), 300 S. W. 769

Smith v. Redman, (1927), 244 Ill. App. 434, was an action for personal injuries sustained by appellee when the seat in which she was sitting in appellant's theater collapsed. As in the instant case, the defendants pleaded the general issue and moved for a directed verdict on practically the same grounds relied upon by the defendant herein (R. p. 132).

The appellate court said:

"Appellants contend that the declaration does not state a cause of action because it does not aver that they had knowledge of the al-

leged defective condition of the seat or that by the exercise of reasonable care they would have known of such defective condition. They also insist that there is no proof in regard to those matters. They pleaded the general issue. *Had they desired to question the sufficiency of the declaration they should have demurred and abided by their demurrer. A motion* to exclude the evidence and *for a directed verdict is not a proper method of questioning the legal sufficiency of the declaration as a pleading* (citing authorities).

"*Pleading to the merits in an action for negligence waives the objection that the declaration fails to aver that defendant had notice of the alleged defect and that plaintiff was without notice thereof* (citing authority). * * * * * * *

"It has been held, however, that the proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation, and *if he neglects his duty in this respect so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial. Currier v. Boston Music Hall Ass'n*, 135 Mass. 414. That case was cited with approval in *Hart v. Washington Park Club*, 157 Ill. 9. In the state of the record it is unnecessary for us to decide whether the doctrine of *res ipsa loquitur* is applicable. In cases of this general nature some courts hold that the doctrine aforesaid applies, while other courts hold to the contrary." (Italics ours.)

See also:

Johnson v. Marshall, (1926), 241 Ill. App. 80 at p. 87

Conrad v. Wheelock, (D. C.), 24 F. (2d) 996

Hart v. Martin, (Tex. 1927), 299 S. W. 520

Blackwelder v. Fergus Motor Co., 80 Mont. 374 at p. 387, 260 Pac. 734, holds that if the allegations of a complaint were insufficient, "it will be deemed to be amended to conform to the proof, as such amendment would cause the complaint to conform to the theory on which the case was tried."

LaBonte v. Mutual Fire & Lightning Ins. Co., 75 Mont. 1, 241 Pac. 631, holds that a motion for directed verdict should not be granted if defendant's evidence supplies deficiencies in plaintiff's case. At page 14 of the opinion the Montana Supreme Court said:

> "The rule is equally well settled in this state that where evidence, which might have been excluded as not tending to reflect upon any issue made by the pleadings, has been admitted without objection, it will be given the same consideration as though fully warranted by the pleading of the party offering the evidence, or, in other words, the pleading will be treated as if it had been amended to admit the introduction of the evidence."

Again at p. 15:

> "As defendant permitted this evidence to go in without objection, the court was justified, on the motion for a directed verdict, in treating the complaint as though amended to

admit the introduction of that evidence, and did not err in overruling the motion."

DEPOSITION OF CHARLOTTE LOBLE

The deposition of Charlotte Loble (R. pp. 122-131), standing alone in the record, is sufficient to defeat defendant's motion for a directed verdict.

The deposition was taken pursuant to stipulation of the parties hereto (R. p. 122). It was introduced and read into the record. No objection was made to its admission nor to any interrogatory or answer therein contained.

The *issues of fact* thus presented in this deposition were for the determination of the jury.

In Spaids v. Cooley, 113 U. S. 278, 28 L. Ed. 984, the Supreme Court reversed a case in which a verdict was directed for the defendant. The court there considered a deposition wrongfully excluded and held that *the evidence, on a material issue, therein contained was sufficient to take the case to the jury.*

It is plain from the foregoing authorities that, even when the case is considered on the erroneous theory advanced by the trial judge, the motion for a directed verdict should have been denied.

The Issues of Fact

The record herein presents numerous *issues of fact* all of which were for the jury to determine.

Among those issues of fact, tending to show the

negligence of the defendant, are the following, viz.:

Permitting the charged wire:

(1) *To lie* so near the street;

(2) *To hang down* so near the street;

(3) *To be* so near the street;

(4) *To be upon* the public sidewalk;

(5) *To remain* upon the public sidewalk.

Failure to provide against reasonable and probable contingencies (R. p. 8) including the following:

Failure:

(1) To discover the defect and break;

(2) To have and provide expulsion fuses;

(3) To maintain proper insulation;

(4) To properly inspect the wires, poles and fastenings;

(5) To turn off the current when notified of the defect by the witness Cummings (R. pp. 47, 99);

(6) To repair the defect when notified by the witness Cummings (R. pp. 47, 99);

(7) To have automatic circuit breakers attached to the line;

(8) To repair the defect or turn off the current until *forty minutes* after defendant's own automatic device indicated trouble on the wire (R. p. 88);

(9) To promptly take steps to ascertain the real trouble with the wires when notified at 10:26 o'clock p. m. (R. p. 99);

(10) To so maintain and use the wire so as not to injure plaintiff.

It was likewise for the jury to determine the cause of the breaking of the wire; whether defendant had allowed its wires, insulation, etc., to become defective; whether there was an unprecedented storm or not and if so, whether the storm or known or discoverable defects caused the wire to fall and, if the storm did cause it to fall, whether or not the defendant did not have more than "a reasonable time" after it was notified at 10:26 o'clock p. m. to either turn off the current or repair the defect before the plaintiff was injured at 11:20 o'clock p. m.—*almost one hour later.*

The above are some of the *issues of fact* presented by the record herein.

In Dunagan v. Appalachian Power Co., (C. C. A. 4th), (1928), 23 F. (2d) 395 at p. 398 it is said:

> "The evidence shows that, while the defendant's line had been patrolled a short time before the accident, it had not been given a thorough inspection for a period of about 8 months. Companies handling electricity of the power proven here certainly owe the duty of a thorough inspection at such intervals as are demanded by the business. As to just what would constitute proper inspection in this case the record is not clear, although one of the defendant's witnesses testified that such inspections had been made as was customary."

The defendant, having received notice of the defective condition of the wire from *forty-five to*

fifty-four minutes before the accident and having neglected to turn off the current, is liable, *regardless of the cause which produced the defective condition.*

See:

Zinkiewicz v. Citizens Electric Etc. Co., 53 Pa. Super. 572

In Novak v. Borough of Ford City, (1928), 292 Pa. 537, 141 Atl. 496, the court said:

> "There was no proof of actual notice to the borough that the wire was down, but ample constructive notice. There was evidence that it was thus down two months before the accident, also one month before and two weeks before. There was further the testimony of two ladies * * * that it was down in the same condition the preceding summer. Appellant strenuously contends that the latter should have been rejected as *too remote. This contention cannot be sustained* in view of the testimony tending to show that the position of the wire remained unchanged. * * * On the question of constructive notice it is competent to show the thing complained of had long existed (citing authority); for example, that a highway had long been in disrepair. In the instant case, *whether the position of the wire had been changed since the previous summer was a disputed question for the jury.*" (Italics ours.)

A CASE FOR THE JURY

As was said in Quaker City Cab Co. v. Fixter, (C. C. A. 3rd), 4 F. (2d) 327 at p. 328,

> "The testimony on the issues in the case is inconsistent and contradictory. Under such circumstances, *it was the duty of the court to submit the case to the jury, whose province it was to reconcile conflicting statements and determine the facts upon which its verdict was based.*" (Italics ours.)

See:

United S. S. Co. v. Barber, (C. C. A. 6th), 4 F. (2d) 625 at p. 626

McDowell v. Kiehel, (C. C. A. 3rd), 6 F. (2d) 337

In the recent case of Novak v. Borough of Ford City, (1928), 292 Pa. 537, 141 Atl. 496, a boy was injured in a public park by coming in contact with a high voltage wire of defendant which it had suffered to remain in such a sagged condition that it was only about 4 or 5 feet from the ground. In that case the court said:

> "It needs no argument to show that suffering a high-voltage wire to remain so near the ground in a place frequented by the public was evidence of negligence. *Even conceding that the wire was 6 or 6½ feet from the mound,* as stated by a majority of defendant's witnesses, *the question of negligence would still have been a question for the jury.* The trial judge properly instructed them that electricity was a highly dangerous agency and

those using it must exercise the highest degree of care consistent with its practical operation (citing cases). It was defendant's duty to place the wire safely and *keep it so by inspection and repair.* If from any cause it unduly sagged, *the defendant should have found and repaired it*" (citing authority). (Italics ours.)

In Solomon v. Light & Power Co., 303 Mo. 622, 262 S. W. 367, the court said:

"The plaintiff produced substantial evidence tending to show that defendant's wires running through the trees in the 700 block *were permitted to sag;* that *in places* near the trees *the insulation had worn off;* that the green limbs of the trees when the wind was blowing was sufficient to cause the 2300 voltage wire to come in contact with the wire of 110 voltage and communicate to the latter a part at least of the 2300 voltage in excess of 110; *that the above conditions had existed for a sufficient length of time to impart notice to defendant; that sparks had been seen flowing from the wires in said trees* for some time before the death of decedent. *The foregoing facts presented to the jury a typical case of strong circumstantial evidence, upon which they were warranted in returning a verdict for plaintiff, based upon proper instructions.*" (Italics ours.)

In Wright v. Richards & Co., (1926), 214 Ala. 678, 108 So. 610, the court said:

"There was evidence tending to show that the deceased, while walking along the street,

came in contact with this suspended wire and was killed. A discussion of the evidence on this issue in detail would not be fitting. Sufficient to say the issues as to whether death was caused by coming in contact with the wire, and whether deceased by his negligence proximately contributed thereto, *were for the jury.*" (Italics ours.)

In Reynolds v. Iowa Southern Utilities Co., (C. C. A. 8th), 21 F. (2d) 958, it is said:

"There is no contradiction of authority as to the duty of those in control of wires conveying the dangerous agency of electricity to use a high degree of care in insulation and inspection thereof to protect those who may lawfully come in contact with said wires. The rule is concisely stated in Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 162 F. 276, as follows: 'At points or places where people have the right to go for work, business, or pleasure the insulation and protection should be made as nearly perfect as reasonably possible, and the utmost care used to keep them so.' And in 20 Corpus Juris, p. 355, Par. 42: 'The exercise of a sufficient degree of care requires a careful and proper insulation of all wires and appliances in places where there is a likelihood or reasonable probability of human contact therewith, and the exercise of due care to make and keep insulation perfect at places where people have a right to go on business or pleasure.

"It is said that worn or insufficient insulation is worse than none, since it gives a false

appearance of security, but this has been denied. The failure to insulate is not excused by the fact that it may be expensive, or that wires carrying similar currents are not insulated elsewhere. But the fact that the methods of insulation suggested involve a large expense is a matter to be considered in determining whether defendant exercised due care, under all the circumstances of the case, in not insulating its wires. * * *

"As stated in Joyce on Electric Law, Par. 445: 'A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places." (citing numerous cases). * * *

"The court also said that it had been unable to find any evidence of negligence on the part of the defendant in error. A reference to the record does not bear out the claim of no evidence in support of the theory of negligence. *There was testimony that the insulation upon these wires was all that could be provided, and there was testimony to the contrary.* There was also testimony that the wires had a ragged appearance and in this particular tree *snapping and sparks from the*

wires had been observed for a considerable period of time. * * *

"In any event, however, a negligent custom would not excuse defendant in error from exercising a high degree of care to see that wires, known by it to be carrying a dangerous current of electricity, sufficient to injure those coming in contact therewith, through a play place of children of tender years, were properly insulated and so kept. * * *

"*We are satisfied the question of the exercise of proper care in the insulation and maintenance of the wires passing through the tree was a fact one under this record.* * * *

"The question of proximate cause was also one for the jury. * * *

"*The questions here are peculiarly for the jury. We think the court erred in directing a verdict. It was for the jury to say* whether the company had actual or implied knowledge of the use of the tree by children as a play place. If the jury should find such knowledge, then it was for it to say under the evidence whether the defendant in error had exercised the high degree of care demanded by the law in the insulation, maintenance, and inspection of its wires passing through the tree." (Italics ours.)

In the recent case of Salwiecz v. Rutland Light & Power Company and Vermont Hydro Electric Corporation, (Vt. 1928), 142 Atl. 77, the facts are similar to those in the instant case. The trial court *directed a verdict* for the defendants. The

case was reversed by the Supreme Court which said at p. 78:

> "The Vermont Hydro Electric Corporation owned the transmission line. Its electricity escaped and injured the plaintiff. The proof of this established a prima facie case. The plaintiff was on the land of the Vermont State Belt Railway Corporation when injured. Whether rightfully or wrongfully there is immaterial, in view of the Humphrey Case, and did not affect the duty owed him by the transmitter of the electricity. Of course, the defendant *may not* be liable, for it is not an insurer, but *its nonliability could not be ruled on as a matter of law. The case should have gone to the jury* with the Vermont Hydro Electric Corporation the sole remaining defendant." (Italics ours.)

In Annapolis & Chesapeake Bay Power Co. v. State, (Md. 1927), 136 Atl. 615, at pp. 616, 617, the court said:

> "Whether the prima facie evidence of negligence was met by defendant *was a question for the jury.* Besides, there was affirmative evidence from which, if believed, the jury might have found negligence. There was evidence that the wire fell and was seen emitting sparks thirty minutes before deceased came in contact with it; that one witness called up the trouble station over the telephone three times, the first time being 25 minutes before the accident; that another witness called up about 20 or 25 minutes before the occurrence;

and that each of these witnesses called attention to the dangerous condition and warned that some one would be killed if the wire was not repaired or removed; that the first witness looked in the telephone book each time before calling to be sure he was asking for the right number, etc. * * *

"Under the circumstances of the present case *it was for the jury to determine* whether the defendant was reasonably prepared to promptly respond to emergency calls of this sort, which, according to defendant's own testimony, are liable to happen without any known cause; whether it received notice, or ought to have known of the trouble, through the mechanical devices with which it was equipped according to the evidence; and whether defendant was negligent in turning on current or in failing to shut it off after being warned of danger." (Italics ours.)

CONCLUSION

The facts and pleadings in this case are simple. The *issues of fact* presented by the record are clear cut.

The authorities are numerous. The principles of law applicable are well settled. The decisions of the courts, both state and federal, applying these principles are practically uniform.

A. Should the averments of negligence in the complaint be considered as *general* then all the *issues of fact* presented by the evidence herein are

properly pleaded. This irrespective of the doctrine of res ipsa loquitur.

See:

Smith v. Redman, (1927), 244 Ill. App. 434
Wallace v. U. S., 16 F. (2d) 309 at p. 312

B. Should the averments of negligence in the complaint be considered as *specific*, then the complaint will be treated as having been amended to properly put in issue the material matters introduced in evidence without objection by either party.

See:

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680
(Also cases hereinbefore cited in paragraph 7 of the Summary)

C. Should the case be considered on the theory upon which it was tried by both plaintiff and defendant then the doctrine of res ipsa loquitur is applicable,—the negligence is pleaded in *general terms* and all the contradicted material matters introduced in evidence by either party constitute the *issues of fact* herein.

(See cases hereinbefore cited in paragraph 2 of the Summary)

Considered from any of the above mentioned three angles, *issues of fact* are presented by the record herein.

D. The trial judge recognizes the presence of these issues in the case (R. pp. 93, 108, 109).

Each of these *issues* is supported by substantial evidence. These issues are to be determined by the jury and not by the court.

(See cases hereinbefore cited in paragraphs 1 and 8 of the Summary)

It is respectfully submitted that the motion for a directed verdict should have been denied and that the judgment (R. p. 17) and order (R. p. 140) of the District Court should be reversed.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant,
Helena, Montana.

No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

vs.

HELENA GAS AND ELECTRIC CO., a corporation,

Appellee.

Reply Brief of Appellant

LESTER H. LOBLE
HUGH R. ADAIR
Attorneys for Appellant
Helena, Montana

Filed.....1929.

.....Clerk.

No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

vs.

HELENA GAS AND ELECTRIC CO., a corporation,

Appellee.

Reply Brief of Appellant

Appellant here replies to the argument advanced in appellee's brief.

BROKEN OR FALLEN WIRES

a. (Specific Allegations)

At page 2 of its brief appellee insists that the complaint charges negligence in *specific* and not in general terms.

At page 4 appellee says, "the only negligence charged, is that the defendant negligently, carelessly and recklessly allowed and permitted a broken wire, charged with high electric current, *to be* and *remain* upon a public sidewalk." (Italics ours.)

We do claim that defendant was negligent in allowing the charged wire "*to be* and *remain* upon a public sidewalk." A simple turning of a switch or lever, by defendant's operator at its plant, would have turned off the current and immediately rendered the dangerous charged wire, dead and harmless.

It was defendant's duty to not permit the charged wire "to be and remain" upon the public sidewalk after it had notice of the existence of the dangerous condition. It was defendant's duty to first turn off the current and next to remove, from the public sidewalk, the wire in question.

This duty defendant should have performed first at 10:26 P. M., when notified by Mr. Cummings (R. pp. 99, 47),—next between 10:26 and 10:50 P. M. when notified by some one (R. p. 99) and third, at 10:50 P. M. when defendant's automatic device registered trouble (R. p. 88).

Defendant's negligence and failure to perform this duty subsequently resulted in the injury to plaintiff at 11:20 P. M.

In 20 Corpus Juris, Section 43, p. 357, it is said:

> "Where an electric company receives notice that a wire is down in the street *it should instantly turn the current off and keep it off till proper precautions are taken to prevent danger to persons* or property from the fallen wire, and until it is ascertained that it is safe to turn it on." (Italics ours.)

Had the defendant performed its duty as above, the plaintiff would not have been injured.

Clearly there is substantial evidence shown by the record herein which would warrant a jury in finding that the defendant was negligent in permitting the charged wire "to be and remain" upon the public street for the period of approximately an hour after it had received actual notice of the dangerous condition.

b. (General Allegations)

At page 33 of our former brief attention was called to the fact that when it came to making its record and presenting its defense, defendant was not content to consider the complaint as containing a single *specific* act of negligence.

At pages 26 and 27 of its printed brief, appellee explains its double position in this fashion:

> "However, in view of the conflict in the authorities * * * and of plaintiff's contention at the trial that the complaint did contain a general charge of negligence upon which they relied, *it was considered a safer practice for the defendant not to rely solely on the defense*

> *that plaintiff had failed to prove the specific negligence charged.* Such practice was especially justified in this case as defendant was able to show standard equipment in its wires, cross arms, etc., and also that the breaking of the wire was due to an act of God." (Italics ours.)

As was aptly said in the recent California case of Martin v. Pacific Gas & Electric Co. (1928) 264 Pac. 246 at p. 248:

> "Counsel for defendant, having taken this position of weakness, undertook with great skill to turn it into a position of strength."

In the Martin case, supra, as here, the defendant, by an admission tendered, sought to limit the evidence to one *specific* ground, viz: "that the defendant negligently permitted the electric power wire 'to remain' on the ground" (264 Pac. at p. 251). The trial court declined to confine the proof to such narrow limits, holding that the complaint charged negligence in maintaining the wire as well as in failure to remove it from the sidewalk after it became broken.

At page 249 of the opinion it said:

> "With this construction of the pleading on the issue of negligence, practically all of the contentions of appellant, one by one must fail. For example, the admission indulged by it, which undertook to limit the proof, becomes an admission of only one of the two or more specific acts of negligence alleged to have

proximately contributed to plaintiff's injuries. Such an admission not only did not authorize the court to limit the evidence, but in reality it would have been error if the court had undertaken to so limit it. Williamson v. Atlas Power Co., 212 App. Div. 68, 208 N. Y. S. 301. This construction of the pleading makes also free from error the act of counsel for plaintiff in referring to all the issues on negligence in his opening statement. This same observation is true with reference to the marshaling and introduction of evidence to prove each of the specific acts of negligence alleged in said paragraph."

The first case cited by appellee in its brief (Br. p. 10) is Aument v. Penn. Telephone Co., 28 Pa. Super. 610. Obviously the case is not in point.

The later case of Zinkiewicz, 53 Pa. Super. 572, decided by this same Superior Court, is very much in point in view of the holding that an electric light company,

> "would be responsible for the consequences of permitting a live wire to dangle upon the road after notice, actual or constructive, *regardless of the causes producing such a condition.*" (Italics ours.)

ORDER OF PLAINTIFF'S PROOF

At pages 3 and 4 of its brief, appellant calls attention to certain objections made to evidence offered by plaintiff in his *Case in Chief* relating to defective conditions of the wire in question.

These objections were sustained upon the grounds that the evidence was prematurely offered.

Plaintiff recognized such evidence was more properly rebuttal and the court likewise adopted this view. (R. p. 36. Also appellee's brief p. 4.)

The case of Johnson v. Grays Harbor R. & L. Co., (Wash.), 253 Pac. 819, quoted from by appellee at pages 15 and 16 and cited again at page 36 of its brief, the court said at p. 820:

> "It is conceded that, when appellant's evidence showed that the death resulted from contact with a live wire which had a loose end lying in a public street, *a prima facie case was made, and that respondent must then assume the burden of showing that the result was not caused by its own negligence.*" (Italics ours.)

Clearly, after the defendant assumed "the burden" and introduced evidence of standard equipment, "act of God," etc., it was proper for plaintiff to then offer evidence in rebuttal thereof, which plaintiff did without objection from the defendant.

This contradictory evidence so introduced, on the issues in the case, made it the duty of the court to submit the case to the jury, whose province it was to reconcile conflicting statements.

SPARKING WIRES

Flashes occasioned by escaping electricity on defendant's line in the vicinity where plaintiff was injured was observed by seven different witnesses.

These flashes began about 10:26 P. M., when first observed by Mr. Cummings, and continued until plaintiff was injured at 11:20, when defendant finally turned off the electric current.

"Sparking" wires and defective insulation had been previously observed at or in close proximity to the point where the wire broke. There were only five wires on the defendant's line and it was the business of the defendant and not the business of the plaintiff or those reporting the trouble to ascertain or know what particular wire "was sparking."

On defendant's motion for a directed verdict plaintiff is entitled to the benefit of every fair inference which might reasonably be drawn by the jury from the evidence.

It is not unreasonable to infer that there was some defect which caused the wire to "spark,"—that there was some defect which caused one wire to break and fall while the other four remained intact and in place and that the defective "sparking" wire was the one which did the injury to plaintiff.

The law does not require the injured plaintiff to identify, specify, point out and number a certain wire which "sparked" at the place where he was injured as the one with which he came in contact.

See:

45 Corpus Juris, section 652, pp. 1082-1084.

RES IPSA LOQUITUR

So far as the particular issues in the present case are concerned, it is immaterial whether the doctrine of res ipsa loquitur is or is not applicable.

In a case such as is shown by the record herein, quoting the language of Wallace v. United States, 16 F. (2d) 309 at page 312, "No confirmation is needed by application of the rule of res ipsa loquitur."

Among the authorities cited in the Wallace case, *supra*, in support of the above, is the case of Lucid v. Dupont (C. C. A. 9th), 119 Fed. 377, from which appellee quotes on page 37 of its brief.

See also:

Smith v. Redman, (1927), 244 Ill. App. 434.

STANDARD EQUIPMENT

It is true defendant attempted to show that its equipment was standard but there was considerable substantial evidence introduced on behalf of plaintiff to the effect that the insulation was defective and worn (R. p. 86),—that there was no fuse on the circuit (R. p. 87),—that no inspection had been made for some two years (R. p. 84),—that the construction and equipment "was the poorest construction I have ever seen" (R. p. 112),—that the type of construction used is dangerous and that by reason thereof Helena is known among electricians as a "hot town" (R. p. 112).

This conflicting evidence presents questions of fact which are to be determined by a jury.

ACT OF GOD

In its answer defendant pleaded an "unprecedented wind and storm" (R. p. 12).

In our brief we adopted defendant's language and pointed out the fact that there were at least *three precedents* for the storm in question (R. p. 57).

In appellee's brief it prefers the use of the phrase an "act of God" to the more clearly defined term of unprecedented storm.

In the first place the evidence falls far short of showing an "act of God."

As was said in Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374:

> "The term act of God in its legal sense applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."

In 1 Corpus Juris, section 2, p. 1174, it is said:

> "The principle embodied in all of the definitions is that the act must be one occasioned exclusively by violence of nature and *all human agency is to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from ac-*

tive intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God. Thus if a party is in default for not performing a duty or not anticipating a danger, or where his own negligence has contributed as the proximate cause of the injury complained of, he cannot avoid liability by claiming that it was caused by an act of God. If divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge from liability." (Italics ours.)

See also:

London Guarantee & Accident Co. v. Industrial Acc. Com'n, (1927 Cal.), 259 Pac. 1096

Rocca v. Tuolumne County Elec. Power & Light Co., 76 Cal. App. 569, 245 Pac. 468

Gans S. S. Line v. Wilhelmsen, (C. C. A. 2d), 275 Fed. 254

U. S. v. K. C. So. R. Co., 189 Fed. 471

Gleeson v. Virginia Midland R'D Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458

In the second place, even though the storm in question had been of such character as to come within the definition of an "act of God" still the question as to whether the injury to plaintiff was caused by an "act of God" or whether it was caused by the negligence of defendant, presents a question of fact *to be determined by the jury.*

In Lewis v. Harvey, 101 Kan. 673, 168 Pac. 856, the defendants pleaded an "act of God" as a defense. The court said at pp. 857, 858:

> "This particular accident would not have happened if there had been no flood; neither would it have happened if the wires had been so arranged that they could not fall on each other. (Citing and quoting from 1 C. J. 1174.)
>
> * * * * * *
>
> "See, also, The Law of Electricity, by Curtis, secs. 454, 455; 4 R. C. L. 715-717.
>
> "An 'act of God' as known in the law is an irresistible superhuman cause, such as no reasonable human foresight, prudence, diligence, and care can anticipate and prevent. (Citing authority.)
>
> "Was Frank Lewis killed by an 'act of God'? *Under the evidence, that question was for the jury to answer.*" (Italics ours.)

In Johnson v. Grays Harbor R. & Light Co. (1927 Wash.), 253 Pac. 819, cited and quoted from in appellee's brief, the court said at p. 821:

> "Other instructions were excepted to upon the ground that they submitted to the jury the issue of whether the act of God was responsible for the accident. *Since we have held that the issue was properly before the jury,* these assignments of error are thus disposed of." (Italics ours.)

Appellee, on the last page of its brief (Br. p. 39), asserts that:

> "the evidence in support of defendant's defense of an act of God shows that the breaking of the wire was *probably* due to this extraordinary wind storm and *destroys any presumption of negligence that otherwise might have existed under such doctrine. So there was no question for the jury even on the theory that the complaint contains a general charge of negligence.*" (Italics ours.)

The above argument was set at rest and determined by the United States Supreme Court, adversely to appellee's contention, no less than 38 years ago.

In Gleeson v. Virginia Midland R'D Co., 140 U. S. 435, it was contended that the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise. At page 444 of the opinion, Mr. Justice Lamar, speaking for the court, said:

> "Neither of these attempted distinctions is sound, * * * * *
>
> "The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that

the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. *And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.*" (Italics ours.)

CONCLUSION

The Seventh Amendment to the United States Constitution provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

In Robestelli v. N. H. & H. R. Co., 33 Fed. 796, which was a negligence action, the court said at page 801 of the opinion:

> "*The plaintiff had the right to have all these questions of fact passed upon by the jury.* This right was guaranteed to her by the supreme law of the land in the eighth (seventh) amendment to the constitution. And this right involved, not only the existence of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established." (Matter in parentheses inserted. Italics ours.)

In 20 R. C. L., sec. 141, at pages 169 to 171, it is said:

> *"The right of a party to have the jury pass upon the question of liability becomes absolute where the facts are in dispute and the evidence is conflicting, or when the proof discloses such a state of facts that, in essaying to fix responsibility for the injury or damage, different minds may arrive at different conclusions.* The question of the defendant's liability lawfully can be withdrawn from the jury and determined by the court as a question of law, when and only when the facts are undisputable, being stipulated, found by the court or jury, or established by evidence that is free from conflict, and when the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it. But the fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered." (Italics ours.)

The instant case should have been submitted to the jury. It was error in the court to deny plaintiff his constitutional right of trial by jury. It was

error to direct a verdict for defendant. For these reasons the cause should be reversed and remanded for a new trial.

Respectfully submitted,

LESTER H. LOBLE

HUGH R. ADAIR

Attorneys for Appellant
Helena, Montana

No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

vs.

HELENA GAS & ELECTRIC CO., a corporation,

Appellee.

BRIEF OF APPELLEE.

GUNN, RASCH, HALL & GUNN,
Attorneys for Appellee,
Helena, Montana.

Filed.....1929.

.....Clerk.

No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

vs.

HELENA GAS & ELECTRIC CO., a corporation,

Appellee.

BRIEF OF APPELLEE.

Appellant's statement of the case is so concise that it omits much that is material to the consideration of the questions presented. Such additional facts will be referred to later in discussing the evidence.

Counsel submit an imposing list of cases, most of which support general principles of law, regarding which there is no dispute and which cases are not applicable to the pleadings and facts in this case.

Before reviewing the facts and discussing the law applicable thereto, certain statements in ap-

pellant's brief, with which we cannot agree, will first be considered.

On page 4 it is stated that the complaint "alleged the negligence of the deefndant in general terms." On the contrary, the complaint, in paragraph 15, specifically alleges the only negligent acts complained of, in the following language:

> "That at said time and place, the said defendant in violation of the duty it owed to the public generally and to this plaintiff in particular, negligently, carelessly and recklessly allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily chraged with such high and dangerous electric current in voltage of approximately 2000 volts, to be and remain upon said public sidewalk on the easterly side of said Ewing Street, to the great danger of all passers-by." (R. p. 6.)

The allegations in the paragraphs preceding paragraph 15 merely describe the situation, instrumentalities involved and that a wire with a high voltage became broken, without any suggestion of negligence therein. The allegations in paragraphs 19 and 20 (R. p. 8) merely refer to the "negligence of the defendant in this complaint alleged" and to the "acts, omissions, and conduct herein complained of" and the only negligence alleged and the onl yacts or omissions complained of are those set out in said paragraph 15.

On page 2 of the brief they say the boy was seriously and permanently injured. While the evi-

dence shows he did sustain a severe shock, the record does not show any serious permanent injuries. (R. p. 26 and p. 65.)

Appellant, also, on page 4, states that "the case was tried upon the theory that the doctrine of res ipsa loquitur is applicable." This statement is too broad. The answer in paragraph 3 specifically denies the only negligence alleged as contained in paragraph 15 of the complaint and then denies the allegations of paragraphs 19 and 20 (R. p. 11) which merely refer to the acts of negligence complained of in paragraph 15 (R. pp. 6 and 8).

The record shows that defendant did not try the case on the theory that the complaint alleged negligence only in general terms, whereby the doctrine of res ipsa loquitur alone became applicable. When counsel for plaintiff attempted to introduce evidence as to defective conditions of the wire or as to matters other than the specific acts of negligence charged in paragraph 15, objection thereto was made (R. p. 33), and page 35 of the record shows the following:

> "Q. State whether or not within thirty days prior to the 11th day of January 1928 you observed the condition of the wire on this pole?
>
> MR. HALL: We object to that testimony as there is no allegation of any defective condition of the wire and the only allegation of negligence being one, that is this broken wire was allowed to remain there an unreasonable time after it was broke; for the further rea-

son that the plaintiff having elected to stand upon the specific ground of negligence in their complaint cannot rely upon the doctrine of res ipsa loquitur; upon the further ground, if he had any other ground, the defective condition of the wire, they are bound to allege that and prove it if they can, and rather relying on the premises of negligence under the res ipsa loquitur doctrine.

MR. LOBLE: It may possibly be rebuttal.

THE COURT: Yes, if it comes then, reserve it for then, not now. You rely simply upon negligence and discovery and removal of wire after it fell.

MR. LOBLE: That is correct, but we are showing the general condition of the wires since that time, not specifically. Very well.

THE COURT: Your next witness.

MR. LOBLE: Just one second.

MR. ADAIR: May it please the Court: In connection with the allegations of negligence in paragraph 15 of the complaint, we allege it was the duty of the company to keep and maintain its plant and wires in a good and safe condition.

THE COURT: You are alleging duty there; you are not alleging negligence; there is no allegation further than they failed to take up this wire in due time—" (R. pp. 35 and 36).

ARGUMENT.

As already stated, the only negligence charged, is that the defendant negligently, carelessly and recklessly allowed and permitted a broken wire, charged with high electric current, to be and remain upon a public sidewalk (R. p. 6).

The defendant denied such charge of negligence and pleaded, as a separate defense, an Act of God (R. p. 12).

The evidence in this case shows that an unusual, excessive, extraordinary and unprecedented wind storm prevailed during the evening and night of January 11, 1928.

The weather bureau records disclose a maximum velocity of 77 miles per hour (R. p. 57), which occurred between 10:38 P. M. and 11:38 P. M. (R. p. 91). The records of previous winds do not show as much damage reported (R. p. 60) although there were three winds between the years 1912 and 1921 of approximately the same velocity (R. p. 59).

This wind blew down electric light and telephone poles, and wires, signs, street lamps, smoke stacks, chimneys, buildings, sky lights, etc., all over the city (R. pp. 57, 67, 69, 71, 72, 74, 82, and 83). Mr. Bernier, the manager of the electrical department of the defendant company (R. p. 76), testified:

> "That night we were having a great deal of trouble, and from about six-thirty somewhere after that, until away early in the morning about three of the linemen were out, the entire force of linemen, so that the man at the sub-station, when he got word of difficulty or anything, he had to locate these men at the places where they were at work" (R. p. 82).

With such a night and all the linemen out working, the plaintiff left a theatre about three or four minutes after eleven P. M., went to Brady's store

and got some sherbet, then to another place and bought some popcorn, then several blocks to the intersection of Eighth Avenue and Ewing Street, where the wire was down on Ewing Street between Eighth and Ninth Avenues, and he thinks it was about twenty minutes after eleven when he arrived at that point (R. pp. 20-21-22).

Shortly after 11:00 P. M. parties in Mr. Loble's home on Ewing Street heard a scream (R. pp. 37, 39 and 40), and, upon going out, found the plaintiff on the sidewalk and, at about 11:20 P. M., Mr. Loble called Mr. Kellar at the trouble station of the deefndant company (Tr. p. 98) advising him that a person had been hurt by a live wire.

Cummings, a witness for plaintiff, testified that at approximately 10:30 P. M. he noticed intermittent flashes from a wire on Ewing Street between *Eleventh* and *Thirteenth* Avenues (R. p. 46) and telephoned the trouble station at about 10:30 P. M., but that this estimate of the time might be off five or ten minutes (R. p. 48); that the man at the station said he would tell the linemen (R. p. 47) and have them out there at once (R. p. 48).

There were five electric light wires on the cross arms on the poles along Ewing Street (R. p. 76).

Kellar, the man at the trouble station, testified that he got a report of trouble on Ewing Street at 10:50 P. M. and at once killed the *arc circuit* wire (R. p. 98). (So this wire was dead before

the plaintiff left the theatre.) Kellar further testified that at about 11:15 to 11:20 P. M., Mr. Loble called him and said someone had been hurt by a wire on Ewing Street but that he (Kellar) did not know whether he was hurt before 10:50 P. M. by the wire he had killed at that time, or by some other wire (R. p. 98).

Kellar referred Loble to Mr. Bernier (R. p. 98) and later got a communication from Bernier to shut off the east side *primary* wire (R. pp. 98 and 99). Mr. Bernier testified:

> "When Mr. Loble first called me, and I called up the sub-station, he then told me that the arc wire was down at 10:50, and I shut off that wire. The disturbance which shows here wasn't until about 10:50, and that is what I refer to, and it was later than that when Mr. Loble again called me up, a few minutes after eleven, that I first knew there was another wire, or arc wire; that was done by this other disturbance at 11:15 or 11:20." (R. p. 90.)

Bernier, when first called by Loble, called the trouble station and learned from Mr. Kellar that an *arc wire* had been down which was killed at 10:50 P. M., so he did nothing in regard to having other wires killed; but shortly after that he again heard from Loble that a wire was still sparking "when, for the first time, I realized there was some other wire besides the arc wire that was causing trouble; I then called up the plant and told them to kill the wire, and he did so. The reason I know that is because I am on the same circuit

and immediately my lights went out." (R. p. 81.)

The chart or record, (Defendant's Exhibit 2), made by the automatic machine showed circuit trouble about 10:50 P. M. and that after that was taken care of that there was another circuit disturbance about 11:10 to 11:15 P. M. (R. p. 89).

After ordering the second wire killed, Bernier got into his automobile and went to Ewing Street to cut down the wire that had been killed and there met Mr. McCann who came there for the same purpose (R. p. 81).

McCann testified:

> "I was called that night; Mr. Kellar called me from the sub-station at a quarter after eleven to go east on Ewing and told me a man tangled up with the wires and to stay there until the line was repaired; I responded at once, and when I got there Mr. Bernier was coming down the street as I crossed; I couldn't see who it was. I said: Get away from these wires. When I got up I saw it was Mr. Bernier; that is the first I knew of this wire being down when I was called by Mr. Kellar." (R. p. 111.)

It thus appears from the record, without any conflict, that a report of wire trouble on Ewing Street about *four blocks north of the point* of the accident was first made by Cummings somewhere about 10:30 to 10:40 P. M.; that the arc circuit wire with large voltage was theerupon killed at 10:50 P. M.; that the next report of wire trouble on Ewing Street, and also as shown by the chart,

was between 11:15 and 11:20 P. M. when Loble reported someone hurt by a live wire, but with nothing to indicate that he had not been hurt before 10:50 P. M. by the wire killed at that time.

So the first knowledge the defendant had that a live wire, other than the arc wire killed at 10:50, was down on Ewing Street was when Loble called Kellar between 11:15 and 11:20 P. M. There is no evidence to show that this second wire (the only one that could have come in contact with plaintiff as the arc wire was dead before he left the theatre), had been broken and on the sidewalk for even one minute before plaintiff came along.

On the other hand, it appears, without any conflict in the evidence, that the defendant, upon receipt of the first knowledge of wire trouble on Ewing Street at once killed the wire causing the trouble at 10:50, as the chart shows no trouble from 10:50 until between 11:15 and 11:20. It further appears that upon the report from Loble of another live wire on Ewing Street the circuit was at once cut off at 11:20 P. M.

Therefore, the plaintiff failed to prove by any substantial evidence that the broken wire which caused his injury had been broken and down for such an unreasonable length of time prior thereto as to constitute negligence of the defendant or to sustain the only allegations of negligence set out in the complaint.

BROKEN OR FALLEN WIRES.

20 Corpus Juris, p. 356, says:

> "Diligence must be exercised to repair any breaks in the wires. To permit broken, fallen, or crossed wires charged with electricity unnecessarily to remain in a highway is negligence for which a telephone company, electric company, or both are liable. This is true where the company has notice of the condition, regardless of the causes which produced it. But to show negligence in this respect a reasonable time to repair it must have elapsed, except where the break was itself the result of negligence. What is a reasonable time depends on the circumstances of each case."

Where a telephone breaks during a great and unusual sleet storm, and falls upon an electric light wire strung on the same pole, the telephone company cannot be charged with negligence because it did not learn of, and repair the break within an hour or an hour and a half after it occurred.

> Aument v. Penn. Telephone Co., 28 Pa. Super. 610.

Where a telephone wire is broken by a severe storm and falls on an electric light wire which has become grounded by a tree blown over by the storm, the liability, if any, of the owners of the wires depends on the negligence of the construction and maintenance, where the injury occurs immediately after the falling of the wire and before either company has had reasonable time to remove the danger.

Heidt v. Southern Telephone Co., 50 S. E. (Ga.) 361.

Where evidence fails to show that the wire had been broken for more than eight minutes before an accident, held there was no liability.

Jones v. Union Ry. Co., 98 N. Y. Supp. 757.

Where the evidence shows that the wire had been broken about ten minutes before the accident, held that there was no liability. The defendants showed the wire had been broken by a contractor for the city.

Scarpelli v. Wash. Water Power Co., 114 Pac. (Wash.) 870.

In this case, the court said:

> "When a plaintiff in actions of this character makes no attempt to show the negligent cause of the act complained of, but relies wholy on the legal presumption of negligence his facts establish, he must accept or controvert the defendant's explanation as to the cause of the act, and show its insufficiency or other nonapplicable features, if he would prevent the court from holding as a matter of law that the presumption is overcome."

As to lapse of time considered sufficient to afford notice of a defect or for the inspection of a defect, see 20 Corpus Juris, page 361.

Dierks Lbr. Co. v. Brown, 19 Fed. (2d) (8th Cir.) 732, is a good case in which liability is denied and the "res ipsa loquitur" doctrine discussed and held that such doctrine does not relieve the plaintiff of the burden of proving negligence, does

not shift the burden of proof and that the motion for directed verdict should have been sustained. The court said:

> "Assuming as we do that the doctrine of res ipsa loquitur applies in this case, hence that a prima facie case of negligence was established, defendant could exculpate itself by showing there was no defect in its appliances, or that if there was it was caused by circumstances beyond its control, or had existed for so short a period of time that it could not reasonably be expected to have been advised of it. 9 R. C. L. p. 1223, paragraph 30. Does the evidence furnish such exculpation or is there absence of explanation? The ultimate question here is, when all the evidence was in had plaintiff made such a case of negligence as to warrant a jury in returning a verdict for her? * * * *
>
> If a jury could be permitted to guess and speculate in the absence of evidence thereof that the broken wire caused the excessive current, the fact remains that the wire must have been broken within an hour of the time plaintiff claims to have been hurt, as the sewing machine was being operated without any excessive current up to that time. The defendant was entitled to a reasonable time to discover and repair the broken wire. What is 'a reasonable time' is dependent on the circumstances of each particular case. If the facts, or the reasonable inferences to be drawn therefrom, are in dispute it is a question for the jury. Chesapeake Ins. Co. v. Stark, 6 Cranch, 268, 3 L. Ed. 220; Hamilton et al. v. Phoenix Ins. Co. of Hartford (C. C. A.) 61 F. 379. It may, however, be a question of law, if the facts and the reasonable inferences to be drawn therefrom are not in dispute. El-

liott on Contracts, vol. 2, paragraph 1550; Pickel v. Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Keller v. Hasley et al., 130 App. Div. 598, 115 N. Y. S. 564. It would seem that such break in the wire, if it occurred, was so near the time of the alleged accident as to repel under all the circumstances here disclosed any inference of negligence on the part of defendant in failing to discover and repair the same."

Where it appeared that a pedestrian was found dead on the street at 3:00 A. M., wrapped in telephone wire, which had fallen across electric light wire; that only a short time had elapsed between the breaking of the telephone wire and the fatal injury; and there was no evidence that the insulation of the electric light wire was not of the best kind or that proper inspections were not made or that the light company had notice that the wire was broken or could have discovered it in time to have prevented the accident, it was held the jury should have been instructed that there was no evidence of negligence.

United Elec. L. & P. Co. v. State, 60 Atl. (Md.) 248.

In Lanning v. Pittsburgh Ry. Co., 79 Atl. (Penn.) 136, 32 L. R. A. (N. S.) 1043, the syllabus of a well considered case says:

"An electric railway company cannot be held liable for an injury to a person on the street by the breaking of its trolley wire, on the ground that there is no other apparent cause for the break than the negligence of the company."

In this case the court said:

> "There was no direct proof of any negligence that caused the wire to break, but the learned trial judge submitted the question of the defendant's liability to the jury, because, as he states in his opinion over-ruling the motion for a new trial, and refusing judgment for the defendant, he thought it could be fairly inferred from all the circumstances that the company had either negligently constructed its trolley wire, or had failed to keep it in proper repair at the point of the accident, and no other cause was apparent to which the falling of the line could be attributed. The question for the jury was not whether there was no other apparent cause than the defendant's negligence for the breaking of the wire. The question before them was, did the negligence of the defendant company cause it to break? If this did not appear, there was no liability upon the defendant. If a jury in an action against a street railway company is to be permitted to find it guilty of negligence because there is no other apparent cause fo rthe act complained of, it is quite safe to assume that in every case the verdict will be for the plaintiff."

In Cavanaugh v. Alleghany County Light Co., 75 Atl. (Penn.) 21, it was held that negligence on the part of the defendant was not established by evidence that a boy was found lying on the sidewalk, badly burned and dead, with his body in contact with a live wire belonging to the defendant, which had broken and fallen into the street and that it had emitted sparks for some time previous to its breaking, it not being shown that sparks

were emitted at or near the point where it broke and the cause of the breaking being entirely a matter of conjecture.

In Loomis v. Toledo Ry. & L. Co., 140 N. E. (Ohio) 639, a severe wind storm was pleaded as an act of God in defense. It was held that the doctrine of res ipsa loquitur was not applicable where the evidence raised a *probability* of the wire breaking because of an extraordinary wind.

In Johnson v. Graves Harbor R. R. & L. Co., 253 Pac. (Wash.) 819, a severe wind storm was interposed as a defense, held that such defense should be specially pleaded. This is a good case on the evidence sustaining such a defense. In affirming a judgment for the defendant, the court said:

> "An examination of the evidence discloses that the respondent met the burden by evidence almost conclusive in its character. The testimony showed that its plant and system were in proper condition; that the cause of the wire falling to the street was the unusual severity of the storm which *whipped the wires together, causing them to arc and flame, burning through the weatherproofing and melting the copper wire itself;* that the respondent's general manager and all employees that could be summoned were on duty from the time a realization came to them of the destructiveness of the storm, and they endeavored in every way to properly safeguard and protect individuals and property; that the storm was the most severe in the history of the city; and that in the region covered by the Weather

> Bureau at Seattle the records showed the highest wind velocity since the establishment of the United States Weather Bureau there in 1892. We need not detail the evidence further. It was so complete that if the verdict had been contrary it would have been against the weight of the evidence, and the trial court would have, no doubt, granted a new trial." (Italics ours.)

In Summons v. Terrill Elec. L. Co., 1 S. W. (2d) 513, it was held a verdict was properly directed for the defendant in the absence of evidence that it knew the wire was broken and hanging, that it had been hanging a sufficient time to charge defendant with knowledge of its condition, that the wires were old or improperly strung or other evidence than that the wire was broken and hanging over the sidewalk.

SPARKING WIRES.

It is stated on page 23 of appellant's brief that:

> "The wire in question had been defective and had been giving off sparks for a long time prior to the accident (R. pp. 116, 117, 120); defendant had been notified of this condition three times by Mrs. Loble (R. pp. 127, 85, 112, 113, 116, 118, 119), once by Fred Cummings at 10:26 p. m. (R. p. 99) being about forty-five minutes before the injury." (App. Br. p. 23.)

The above statement is not supported by the record. As already stated herein, there were five wires on the cross arms on the poles along Ewing Street (R. p. 76) and there is not a witness who

testified that the wire they saw sparks coming from was the same wire that broke or burned in two the night of January 11, 1928.

The witness Reynolds, called in rebuttal, testified that he was working for the defendant in October, 1926—15 months before, and that his attention was called by Mrs. Loble to *a wire* on the pole or post at the alley in front of 411 North Ewing Street (R. p. 112, 113), which was Mrs. Loble's home (R. p. 123); that this wire was sparking at a point about *2½ feet* from the insulator on the cross arm; that he fixed it at that time and made no report of it to the defendant and that, if the wire broke 12 feet from the pole, the place he fixed had nothing to do with the break on January 11th, 1928 (R. 117). Nowhere does this witness identify the wire that Mrs. Loble called to his attention and that he fixed as being the same wire that broke or burned in two on January 11th.

Mrs. Loble's testimony as to sparking wires does not show which wire or whereabouts on the wire she observed sparks (R. pp. 123-127).

The same is true of the testimony of all the other witnesses for plaintiff regarding conditions of the wires. See testimony of Marion Lane (R. p. 29); Tomcheck (R. p. 34); Mrs. Tomcheck (R. p. 37); Williams (R. pp. 39 and 41); Yund (R. pp. 43 and 44); Cummings (R. p. 46).

The witness Reynolds also testified the wire he fixed in 1926 was not insulated near the cross arm and that when it is on a wet post and uninsulated, it is more liable to break (R. pp. 113 and 117).

Bernier, on cross-examination, admitted that the insulation may in some places be worn off near the cross arms or at other spots (R. pp. 86 and 87).

But there is no evidence to show the wire broke near the cross arm or at a point where it was not insulated. On the contrary, the testimony of Bernier shows, without dispute, that the wire broke or burned in two at a point 12 feet from the pole and cross arm in the alley near Loble's home (R. p. 78), and that he cut off a piece of the wire on either side of the break which pieces were introduced in evidence as defendant's Exhibit 1 (R. p. 78). Such pieces of wire show that the wire at the point of breaking or burning was insulated up t othe time the break or burn occurred (R. pp. 99, 103, 106).

Furthermore, that night it was chinooking and wet (R. p. 34 and p. 57), and the wind was very gusty (R. pp. 68 and 107). Mr. Stussey, electrical engineer of the Montana Power Company at Butte, (R. p. 101), testified:

> "If this wire has insulation such as is called for unde rthe statute of Montana; that is, triple braid weatherproof wire, fourteen or fourteen and a half inches apart, a gusty wind will bring these wires together and the *insulation, if wet, will cause sparks*, and if for

> some cause they break and lay on the ground any person coming in contact with them will get burned." (R. p. 103.) also R. p 94

Therefore, the evidence, admitted over defendant's objection (R. p. 35) as to the condition of wires does not prove or tend to prove any negligence under the issues in this case, as such evidence, undisputed, shows the wire broke at a point at least 10 feet from where sparks were seen coming from *some wire* prior to January 11 and shows, without dispute, that the wire at the point of the break was properly insulated.

So the condition of *some wire* which caused sparks or the uninsulated spots on *some wires* were not a proximate cause of this wire breaking at the point where it did.

In U. S. Elec. Light & Power Co. v. State, 60 Atl. (Md.) 248, the court said:

> "It was error, we think, to have admitted the testimony set out in these exceptions. The effect of the testimony as introduced was to show that the insulation of certain of the defendant's wires was defective at other points and on other occasions than at the point of contact where the accident happened. There was manifestly no connection between the alleged defects and the injury here complained of. The death of the deceased was not caused by the burnings of the wires at other points or on other occasions, but was caused by contact with a telephone wire that had crossed a feed wire of the appellant company on the night of the accident. The testimony, therefore, was too remote and misleading, and pre-

sented an issue of negligence not involved in the case. There was also a want of identification of the wires. There was no proof that the flaring in the trees came from the wire which the telephone wire crossed."

In Cavanaugh v. Alleghany County Light Co., 75 Atl. (Penn.) 21, the court, in sustaining a nonsuit, said:

"All that was proved was that Charles R. Rainey was found lying upon the sidewalk, his body in contact with a live wire, and that a wire of the defendant, which had been stretched along Alder Street, was broken, one end of which was in contact with the body of said Rainey. It must be admitted, under the decisions of our appellate court, that this proof was not sufficient to charge the defendant with negligence. The plaintiff went further, however, and offered testimony to show that the said wire had emitted sparks for some time previous to the happening of the accident which caused the death of Charles H. Rainey, and the plaintiff argues that the inference could be drawn from said evidence that the said wire was not properly insulated, of which defect the defendant either knew or ought to have known. But this testimony did not show that this wire had been emitting *sparks at or near the point where it broke.* The wire had broken near the point where the body of Charles R. Rainey was found, but what caused it to break was, as we thought under this testimony, entirely a matter of conjecture. It is not enough for a plaintiff to show mere conjecture. The law imposes upon the plaintiff the duty of establishing the charge made, to-wit, negligence." (Italics ours.)

In Kentucky Utilities Co. v. Woodrum, et al., 5 S. W. (2nd) (Ky.) 283, the plaintiffs were injured by a broken electric light wire that had fallen onto the street. In holding th eelectric light company not liable, the court said:

> "There was a splice in the wire about 18 inches from one of the poles which had been there several years, but the wire did not break at the splice. The break was about one foot from the splice. A notch had been burned by the wire in the tree above mentioned to which a bracket was attached, but the defect in that respect had been corrected two years before the accident. There seems to be no evidence that the wire was weakened by reason of its having come in contact with the tree. Witnesses testified that a short while prior to the accident they had seen the tree burning where the wire came in contact with it. But, if the wire did not break at that point, there must be other evidence of faulty construction or maintenance. The evidence must be considered as it relates to the span between what was referred to in the evidence as pole A and pole B, and such other evidence as may show a faulty construction elsewhere, which, by reason of some relationship of the faulty construction elsewhere to the particular span in question, the span was also rendered faulty in construction of maintenance. There was evidence that the wires had been broken and spliced at several places; that there were trees through which the wires ran. There was no insulation on the wire, and this was shown by the evidence, but it is well established that wires carrying a high voltage cannot be successfully insulated. * * * *

> The question of negligence based on the ground of faulty construction or maintenance of the wire should not have been submitted to the jury, as there was no evidence to take the case to the jury on that point."

RES IPSA LOQUITUR.

It is true that an injury actually occasioned from broken electric light wires in a place where the injured party had a right to be is usually held to raise a presumption of negligence. 20 Corpus Juris, Section 63, page 380.

But, according to the great weight of authority, the above rule is not applicable when the complaint alleges specific acts of negligence instead of relying upon a general allegation of negligence alone.

Where specific acts of negligence are alleged, the plaintiff must prove such acts and cannot rely upon the presumption of negligence that arises under the res ipsa loquitur doctrine.

In Rosco v. Metro. Street R. Co., 101 S. W. (Mo.) 32, an action by a passenger for personal injuries, the court said:

> "What we have said above applies to cases where there is a general allegation of negligence, but the rule is different where there are specific allgations of negligence. The rule as to proof is different, and the rule as to presumption is different. General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negli-

gence is indulged. But if plaintiff, by his petition, is shown to be sufficiently advised of the exact negligent acts causing, or contributing to, his injury, as to plead them specifically, as in this case, then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act, and he admits that he does so know it by his petition, then he must prove it, and, if he recovers, it must be upon the negligent acts pleaded, and not otherwise. In other words, the burden of proof is upon plaintiff, as it would be in any other kind of a case. The rule of presumptive negligence and the rule allowing the pleading of negligence, generally, are rules which grow up out of necessity in cases of this character, and are exceptions to the general rules of pleading and proof. Where plaintiff, by his petition, admits that there is no necessity, the reason for the rule, ex necessitate, fails, and with it the rule itself."

In Lyons v. Chicago, Mil. & St. P. Ry. Co., 50 Mont. 532, the court, in discussing this question, said:

"The rule does not apply, however, in any case where from the evidence different inferences may be drawn as to the producing cause of the injury (McGowan v. Nelson, 36 Mont. 67, 92 Pac. 40; Andree v. Anaconda Copper Min. Co., 47 Mont. 554, 133 Pac. 1090); and since its effect is that of a presumption only, it cannot exist in the presence of the known facts (Gibson v. International Trust Co., 177 Mass. 100, 52 L. R. A. 928, 58 N. E. 278; Bell v. Town of Clarion, 113 Iowa, 126, 84 N. W. 962). If the plaintiff is in position to *allege the specific negligent acts which caused the injury* and can produce evidence in support of the charge sufficient to

make out a prima facie case, *the doctrine res ipsa loquitur cannot be invoked,* for to apply it under such circumstances would permit the jury to give double weight to the evidence; first to the facts themselves, and also to the inference or presumption which the law deduces from the existence of those facts, or some of them (1 Elliott on Evidence, Sec. 92)." (Italics ours.)

This is the rule in the Federal Courts.

Midland Valley Ry. Co. v. Connor, 217 Fed. (8th Cir.) 956;
White v. The Chicago & G. W. Ry. Co., 246 Fed. (8th Cir.) 427.

See also:

Pierce v. Great Falls & C. Ry. Co., 22 Mont. 445;
Ramch v. Des Moines Elec. Co., 218 N. W. (Iowa) 340;
Whitmore v. Herrick, 218 N. W. (Ia.) 334;
Walser v. Mo. Pac. R. Co., 6 S. W. (2nd) (Mo.) 632;
Schneider v. Wheeling Electrical Co., 28 S. E. (W. Vir.) 733;
Johnson v. Galveston H. & N. R. Co., 66 S. W. (Tex.) 906;
Palmer Brick Co. v. Chennall, 47 S. E. (Ga.) 329;
Southern Ry. Co. v. Adams, 100 N. E. (Ind.) 773;
Byland v. DuPont etc. Co., 144 Pac. (Kan.) 251;
Durst v. Southern Ry. Co., 125 S. E. (S. Car.) 651.

In this last case, paragraph 4 of the complaint charged a specific act of negligence and paragraph 5 alleged "that said acts on the part of the de-

fendant were due to their negligence," etc. The court held that the allegations in paragraph 5 referred to the spicific acts of negligence alleged in paragraph 4 and did not constitute a general charge of negligence, as did also Judge Bourquin in his opinion in the case at bar, in granting the directed verdict (R. pp. 133-140).

It is true that several courts have held that even though specific acts of negligence have been alleged, if there is also a general allegation of negligence in the complaint, that evidence of other acts or omissions are admissible under such general allegation, if it is a case where the res ipsa loquitur doctrine would apply if no specific allegation had been made.

See:

> Walters v. Seattle R. & S. Co., 93 Pac. (Wash.) 419, 24 L. R. A. (N. S.) 788 and Note.

The author of this note, after referring to the rule limiting plaintiff to his specific allegations and to the rule permitting evidence of other matters, says:

> "A third class of cases, and these seem to present the more reasonable rule, hold that where a plaintiff makes specific allegations of negligence, he must rely for his recovery upon such specific acts of negligence, and cannot recover for any other negligent acts; but he is not deprived of the benefit of the doctrine of res ipsa loquitur to establish the specific acts of negligence."

As heretofore shown, defendant at the trial objected to evidence of other acts than those specifically alleged (R. pp. 33 and 35).

We submit, however, that even if the rule, that when a general charge of negligence is made and also a specific charge that the latter does not preclude evidence under the general charge, that such rule cannot be applied in this case for the reason, as heretofore pointed out, that there is no general charge of negligence in this complaint. The only negligent acts alleged or complained of are the specific acts set out in paragraph 15 of the complaint and the allegations of paragraphs 19 and 20 (R. p. 8) merely refer to such acts, as did the complaint in Durst v. Southern Railway Company, supra.

Counsel for appellant repeatedly cite in their brief the case of Kaemmerling v. Athletic Mining & Smelting Co., 2 Fed. (2nd) (8th Cir.) 574. In that case it was alleged that the injuries resulted "from the negligence of said defendant, its agents, servants and employees, in a manner unknown and unexplained to this plaintiff." The difference between such charge of general negligence and the allegations of the complaint in this case is manifest.

However, in view of the conflict in the authorities as pointed out in 24 L. R. A. (N. S.) 788, and of plaintiff's contention at the trial that the complaint did contain a general charge of negligence

upon which they relied, it was considered a safer practice for the defendant not to rely solely on the defense that plaintiff had failed to prove the specific negligence charged. Such practice was especially justified in this case as defendant was able to show standard equipment in its wire, cross arms, etc., and also that the breaking of the wire was due to an act of God.

STANDARD EQUIPMENT.

The width between electric light wires on cross arms of poles must be not less than 14 inches. Section 2679 Revised Codes of Montana 1921 provides:

> "CROSS-ARMS. All cross-arms shall be made from clear, straight-grained wood, or standardized material. The cross-section of wood arms shall be not less than three and one-half by four and one-half inches. The pin spacing shall be, for six-pin arms, not less than thirty-inch center for pole pin spacing, *fourteen-inch side spacing*, and five-inch end spacing; and four-pin arms not less than thirty-inch center for pole pin spacing, *fourteen-inch side spacing* and five-inch end spacing." (Italics ours.)

The insulation on electric wire, *where insulation is used*, must be at least triple braided, weather-proof cover. Section 2686 Revised Codes of Montana of 1921 provides:

> "WIRE INSULATION. The standard insulation, wherever insulation is used, for any wire or cable run, placed, or erected in any city or town in the state of Montana, and

used to conduct or carry electricity for light, heat, or power, for all voltage, shall have at elast a triple-braided weatherproof cover."

Section 2688 of said Codes provides:

"FOREGOING PROVISIONS APPLY TO CURENT AND VOLTAGE FOR LIGHT, HEAT AND POWER. All of the foregoing provisions of this act shall include current and voltage used for light, heat, or power, not to exceed seventy-five hundred volts of electricity."

It will be noted that Section 2686 does not declare that all wire must be insulated, but merely that "wherever insulation is used" it must be of a certain kind. Insulated wire is not uniformly used for overhead wires (R. p. 93 and pp. 104 and 105). But here the evidence shows that the wire involved was insulated as required by statute for insulated wire and also standard equipment. The voltage of this wire was 2300 volts (R. p. 56); the wire was triple braided, weatherproof cover; size No. 6, hard drawn copper, the standard wire and so recognized by the Bureau of Standards of the Department of Commerce of the United States (R. pp. 78, 79, 101, 102 and 106); the space between the wires on the cross arms was 14½ inches, or ½ inch more than the minimum required by the statute (R. p. 77).

Mr. Schultz, the general manager of the defendant company, testified:

"The wire, poles and arms, sag, and insulation are the standard appliances, all the way

through, used by electric light companies generally throughout the country." (R. p. 106.)

At the point where the wire broke or burned in two it was properly insulated (R. pp. 94, 103, 106). If the defendant used standard equipment, as required by statute, and such as is in general use by electrical companies, it had discharged its duty in that matter, as has been held in many cases involving electricity.

Prussly v. Bloomington & Normal Ry. & Light Co., 111 N. E. (Ill.) 511;
City of Cuthberth v. Gunn, 94 S. E. (Ga.) 637;
Martmek v. Swift & Co., 98 N. W. (Ia.) 477;
Owen v. Appalachian Power Co., 89 S. E. (W. Vir.) 263;
Norfolk & P. Traction Co. v. Daily, 69 S. E. (Vir.) 963;
Texas Traction Co. v. George, 149 S. W. (Tex.) 438.

In Cummings v. Reins Copper Co., 40 Mont. 595, the court said:

"The business of mining is accompanied by more or less hazard in all of its branches. While this is so, the rule of law by which the conduct of the employer toward his employees is governed is that of ordinary care; that is, such care as would be exercised by an ordinarily prudent man engaged in the same business. He must observe this rule in selecting the tools and appliances which he furnishes to his employees to be used in performing their work. When he has done so, he has fully discharged his duty in this behalf. He is not bound to furnish the best appliances, nor the

> safest, nor to provide the best method for their operation, in order to save himself from responsibility for accidents resulting from their use. If, at the time an appliance is selected, it is in general use and reasonably adapted to the purpose for which it is employed, the continuance of its use does not in itself indicate negligence, even though there may be safer devices used by others to accomplish the same purpose."

See also:

20 Ruling Case Law, Section 20, Page27.

In rebuttal, plaintiff called one Reynolds (R. p. 111), who testified that in order to shut off the current on this wire it was necessary to shut off all the lines on the east side of town; that there was a primary cut off at Sixth and Rodney Street and also one at the plant (R. p. 114). He also testified:

> "I know of a type of fuse known as expulsion fuse. With that type of fuse, when the wire becomes short circuited and goes to the ground carrying a heavy load it will explode the fuse and one wire will be killed, or the circuit, whichever is in trouble; so that, if that type fuse had been used in this case, when the wire hit the ground it would have been dead on hitting the ground." (R. pp. 114 and 115.)

There is no evidence to show that such device is in general use by electrical companies. His testimony is merely to the effect that *he knew* of some device for shutting off a current other than the method used in Helena. That such a device was

better or more dependable than those used by the defendant was not shown.

Defendant's evidence showed that instead of a fuse it used an automatic circuit breaker. Bernier testified:

> "There is no fuse on the circuit; there is what we call a circuit breaker to take the place of fuses and does shut if this is interrupted three times; that is what we call a circuit breaker. No, that circuit breaker does not advise us of a break in the wire; it advises everybody there of a break in the main some place. This would show us the primary wire, a wire of 2300 voltage, was having difficulty, that there was trouble some place there. We have a record to show what it means.
>
> Q. I assume someone else keeps that record at the shop?
>
> A. Yes, it is automatic." (R. pp. 87 and 88.)

Schultz, when cross examined as to the use of fuses, testified:

> "There is no equipment made which will cause a circuit to open invariably; it may or may not depend on what the ground condition is near the place, whether it makes a good ground or not. * * * *
>
> If it was the main line, why, you could not break it; you could on a circuit branch; on the main line you could not; you could not." (Rec. pp. 108 and 109.)

As stated in several of the last cases cited above, a person or company is not bound to furnish the best appliances nor the safest. So long as they

are such as are in general use and reasonably adapted to the purpose for which employed, their use does not indicate negligence, even though there may be safer devices used by some to accomplish the same purpose. On this point see also:

Snyder v. Wheeling Electrical Co., 28 S. E. (W. Vir.) 733—a case squarely in point on evidence very similar to that in this case;

Martineck v. Swift & Co., 98 N. W. (Ia.) 477 — where a witness gave testimony similar to that of Reynolds in this case;

Boston C. C. & N. Y. Canal Co. v. Seaboard Transp. Co., 270 Fed. (1st Cir.) 525—affirmed in 256 U. S. 692.

In Lake v. Shenango Furnace Co., 160 Fed. (8th Cir.) 887, Judge Sanborn said:

> "There are cases in which the act or omission at issue is in itself so clearly negligent that the fact that other persons in the same or like circumstances have been guilty of it is insufficient to modify its character or effect. Dawson v. Chicago, R. I. & P. Ry. Co., 52 C. C. A. 286, 288, 114 Fed. 870, 872; Gilbert v. Burlington, C. R. & N. Ry. Co., 63 C. C. A. 27, 32, 128 Fed. 529, 534. The defendant's act or omission was not of that character; and in such a case the true test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same circumstances. If in a given case the care eexrcised rises to or above that standard, there is no actionable negligence; if it falls below it there is."

Assuming, for the moment, that plaintiff's complaint does contain a general charge of negligence, and that he is not limited to the specific charges of negligence therein, we submit that the evidence of the defendant, showing its wire and other equipment complied with the statutes and with the U. S. Bureau of Standards; that they were the same as those generally used by persons engaged in similar business throughout the country; that there was no apparent defect in the wire at the point of breaking and that there was not a reasonable time after the breaking in which to discover and repair the same, completely overcomes any presumption of negligence under the res ipsa loquitur doctrine and made the question of defendant's negligence one of law for the court.

In Dierks Lbr. Co. v. Brown, 19 Fed. (2nd) (8th Cir.) 732, the court said:

> "Assuming as we do that the doctrine of res ipsa loquitur applies in this case, hence that a prima facie case of negligence was established, defendant could exculpate itself by showing there was no defect in its appliances, or that if there was it was caused by circumstances beyond its control, or had existed for so short a period of time that it could not reasonably be expected to have been advised of it. * * * *
>
> As the evidence stood at the close of the case, it showed conclusively that, if there was any defect sufficient to cause an excessive current of electricity to pass over the wires, that defect occurred within les sthan an hour from the time of the accident. The testimony

also, in our judgment, fairly shows that there was no defect in the wires, in the grounded system, in the transformer, or otherwise on the day of the alleged accident. It would seem that the explanation of defendant is sufficient to show that the alleged injury did not occur from want of due care on its part, and the inferences of negligence raised by the application of the doctrine of res ipsa loquitur are refuted. * * * *

Whether there is sufficient evidence to warrant the submission of a case to the jury is a question for the court. We conclude the evidence was not sufficient. The motion to instruct a verdict for defendant, made at the close of all the evidence, should have been sustained."

In Lawson v. Mobile Elec. Co., 85 So. (Ala.) 257, the syllabus of a well considered opinion says:

"In absence of evidence of actual negligence, evidence of due care by the defendant will make the case one for the court, in the sense that the mere presumption involved in the res ipsa loquitur doctrine will not be given the effect of evidence, so as to raise a conflict for jury decision."

In Scarpelli v. Wash. Water Power Co., 114 Pac. (Wash.) 870, where a party was killed by a fallen light wire in the street, the court said:

"When a plaintiff in actions of this character makes no attempt to show the negligent cause of the act complained of, but relies wholly on the legal presumption of negligence his facts establish, he must accept or controvert the defendant's explanation as to the cause of the act, and show its insufficiency or other nonapplicable features, if he would

prevent the court from holding as a matter of law that the presumption is overcome."

See also:

Smith v. N. P. Ry. Co., 53 N. W. (N. Dak.) 173;
Scott v. So. Sierras Power Co., 190 Pac. (Cal.) 478;
Goss v. N. P. Ry. Co., 87 Pac. (Ore.) 149;
Scillars v. Universal Service, 228 Pac. (Cal.) 879;
Spaulding v. Chi. & N. W. Ry. Co., 33 Wis. 582;
Paine v. Cumberland Tel. & T. Co., 249 Fed. (5th Cir.) 477.

In San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 56 L. Ed. 680, the court said:

> "These circumstances pointed so persuasively to negligence on its part that it was not too much to call upon it for an explanation. Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable; but in the absence of that or some other explanation there was enough to justify the jury in finding it culpable."

Here the defendant has shown that the injury could not have been foreseen and guarded against and also shown proper equipment and an extraordinary wind storm—explanations sufficient to overcome any presumption of negligence and to warrant a directed verdict.

AN ACT OF GOD.

The defendant pleaded, as a defense, an unusual, excessive and extraordinary wind storm during the

evening and night of this accident (R. p. 12). The evidence clearly sustains this defense.

According to the weather bureau records, the wind between 10:38 P. M. and 11:38 P. M. reached a velocity of 77 miles per hour (R. p. 57), and according to such records this wind did more damage than any previous wind (R. p. 60). It blew down many electric light and telephone poles, wires, signs, street lamps, smoke stacks, chimneys, buildings, sky lights, etc., all over the city (R. pp. 57, 67, 69, 71, 72, 74, 82, and 83). The entire force of linemen were out looking after wire trouble practically all night (R. p. 82).

As to the sufficiency of evidence to sustain such a defense:

See:

Johnson v. Graves Harbor R. R. & L. Co., 253 Pac. (Wash.) 819, already quoted from in this brief;

Lamb v. Licey, 102 Pac. (Idaho) 378.

In Loomis v. Toledo Ry. & Light Co., 140 N. E. (Ohio) 639, it was held that a presumption of negligence arises from proof of the poles and the electric wires falling upon plaintiff, which requires an explanation of the cause thereof from the defendant, but that where the evidence raises a *probability* that their falling was caused by a severe wind storm, the presumption of negligence does not arise and plaintiff must sustain his specific

allegations of negligence by a preponderance of the evidence.

In Lucid v. E. I. DuPont Etc. Power Co., 199 Fed. (9th Cir.) 377, Judge Gilbert said:

> "The doctrine of res ipsa loquitur involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, *but excludes all others.*" (Italics ours.)

45 Corpus Juris, Section 780, page 1212, says:

> "Accordingly, where there are two or more persons or causes which might have produced the injury, some, but not all, of which were under the control of defendant or for which he was legally responsible, plaintiff, in order to invoke the doctrine, must exclude the operation of those causes for which defendant is under no legal obligation. It has been held that the doctrine is to be applied only when the nature of the accident itself not only supports the inference of defendant's negligence, but excludes the idea that the accident was due to a cause with which defendant was unconnected."

In People v. Utica Cement Co., 25 Ill. App., it was held that,

> "A storm, flood, or freshet, in order to constitute an act of Providence, need not be *unprecedented* if it is unusual, extraordinary and unexpected."

The fact that a similar flood, otherwise unprecedented, had occurred once in each of the two pre-

ceding years held not to prevent a defense of act of God in an action for damages due to a similar unprecedented flood in the third year.

Norris v. Savannah etc. Ry. Co., 23 Fla. 182, 11 Am. S. Reports 355.

In this case the court said:

> "An extraordinary flood, such as that of 1884, described in the testimony, is the act of God, and injury caused to the appellant by it solely is not a ground of action against the common carrier. * * * * We do not think the rises of the Ohio in 1882 and 1883 deprive the rise of 1884 of its character as an act of God, or required the appellee to have reconstructed its road, or provided other means of transportation across the river to meet such emergency. The testimony shows that up to the time the witnesses in the case testified, these rises were wholly unprecedented."

Thompson on Ngligence, in Section 1241, says:

> "Judicial opinion thus, to some extent, places the company betwixt the devil and the deep sea; but their lot is somewhat mitigated by the recollection that they are not liable for damages sustained by failing to erect their poles with such strength as to withstand those great storms which, though liable to happen in any American climate, are placed by the judges in the category of 'acts of God'; which is another way of saying that they are only bound to reasonable care in the construction and maintenance of their lines."

See also:

Ward v. Atl. & Pac. T. Co., 71 N. Y. 81.

If it should be held, as argued by plaintiff, that the complaint does contain a general charge of

negligence under whic hthe doctrine of res ipsa loquitur might be invoked, the evidence in support of defendant's defense of an act of God shows that the breaking of the wire was probably due to this extraordinary wind storm and destroys any presumption of negligence that otherwise might have existed under such doctrine. So there was no question for the jury even on the theory that the complaint contains a general charge of negligence.

We submit that the plaintiff failed to prove the specific acts of negligence alleged by any substantial evidence, and that under the pleadings he was limited to such issue; also, that he failed to make a case for the jury upon any other theory and that the judgment should be affirmed.

Respectfully submitted,
GUNN, RASCH, HALL & GUNN,
Attorneys for Appellee.

No. 5620

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5620

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Alias Writ of Scire Facias	10
Assignments of Error	27
Certificate of Clerk U. S. District Court to Transcript of Record	33
Citation on Appeal	34
Engrossed Bill of Exceptions	24
EXHIBITS:	
Exhibit "A" Attached to Writ of Scire Facias—Bond	7
Exhibit "A" Attached to Alias Writ of Scire Facias—Bond	12
Judgment Absolute on Scire Facias	20
Minutes of Court—December 17, 1927—Order Continuing Motion for Forfeiture of Bonds	3
Minutes of Court—December 22, 1927—Order Forfeiting Bonds, etc.	4
Minutes of Court—March 27, 1928—Order for Writ of Scire Facias	5
Minutes of Court—May 5, 1928—Order Continuing Hearing on Writ of Scire Facias to May 14, 1928	16

Index. Page

Minutes of Court—May 14, 1928—Order Continuing Hearing on Writ of Scire Facias to May 24, 1928 16
Minutes of Court—May 24, 1928—Order Continuing Hearing on Writ of Scire Facias to August 6, 1928 17
Minutes of Court—August 6, 1928—Order Continuing Hearing on Writ of Scire Facias to August 11, 1928 18
Minutes of Court — August 11, 1928 — Order Continuing Hearing on Writs of Scire Facias in Three Cases to September 4, 1928 18
Minutes of Court—September 4, 1928—Order Submitting Return to Writ of Scire Facias 19
Minutes of Court—September 5, 1928—Order for Judgment Absolute 20
Names and Addresses of Attorneys of Record 1
Order Allowing Appeal 28
Order Continuing Hearing on Writ of Scire Facias to May 14, 1928 16
Order Continuing Hearing on Writ of Scire Facias to May 24, 1928 16
Order Continuing Hearing on Writs of Scire Facias in Three Cases to September 4, 1928 18
Order Continuing Jurisdiction of Court to Settle Bill of Exceptions on Appeal 23
Order Continuing Hearing on Writ of Scire Facias to August 6, 1928 17
Order Continuing Hearing on Writ of Scire Facias to August 11, 1928 18
Order Continuing Motion for Forfeiture of Bonds 3

Index. Page

Order Extending Time to and Including October 5, 1928, to Prepare and File Bill of Exceptions 22
Order Extending Time to and Including November 2, 1928, for Transmittal of Record on Appeal and Docketing Cause..... 23
Order Forfeiting Bonds, etc. 4
Order for Judgment Absolute..... 20
Order for Writ of Scire Facias..... 5
Order Submitting Return to Writ of Scire Facias 19
Petition for Appeal..... 26
Praecipe for Alias Writ of Scire Facias..... 10
Praecipe for Transcript of Record..... 1
Stipulation Re Bill of Exceptions..... 21
Supersedeas Bond 29
Writ of Scire Facias..... 5

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For New Amsterdam Casualty Company, Appellant:

KNIGHT, BOLAND & CHRISTIN, Esqs., F. ELDRED BOLAND, Esq., and F. J. KILMARTIN, Esq.

For United States, Appellee:

U. S. ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,827.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH J. PARENTE and NEW AMSTERDAM CASUALTY COMPANY, a Corporation,

Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please make up the record on appeal heretofore sued out and include therein:

Writ of scire facias.

Praecipe for alias writ of scire facias.

Alias writ of scire facias.

Minute orders continuing writ of scire facias for hearing.

Minute orders of September 4 and 5, 1928.

Minute orders of December 17 and 22, 1927, and March 27, 1928.

Judgment absolute.

Stipulation extending time for preparation of bill of exceptions. [1*]

Orders extending time to prepare bill of exceptions.

Order continuing jurisdiction to settle bill of exceptions.

Order extending time to docket cause on appeal.

Petition on appeal.

Assignments of error.

Citation on appeal.

Order allowing appeal.

Bond on appeal.

Bill of exceptions.

This praecipe.

Dated: October 26th, 1928.

F. ELDRED BOLAND,
F. J. KILMARTIN,

Attorneys for Defendant New Amsterdam Casualty Company.

Receipt of a copy of the within praecipe is hereby admitted this —— day of October, 1928.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 26, 1928. [2]

*Page-number appearing at the foot of page of original certified Transcript of Record.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 17th day of December, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—DECEMBER 17, 1927—ORDER CONTINUING MOTION FOR FORFEITURE OF BONDS.

On motion of E. E. Williams, Esq., Asst. U. S. Atty., the Court ordered trial as to defendant Joe Parente be set for Dec. 19, 1927. This case came on regularly for trial as to defendant Fred Marino et al., and after hearing attorneys, the Court ordered said matter be dropped from calendar and placed on reserve calendar of this Court, and that hearing of the motion of Geo. J. Hatfield, Esq., U. S. Atty., for order forfeiting bonds for appearance of defendant Joe Parente be continued to January 4, 1928. [3]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County at San Francisco, on Thursday, the 22d day of December, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—DECEMBER 22, 1927—ORDER FORFEITING BONDS, ETC.

This case came on regularly for trial. Counsel for defendants being present, Geo. J. Hatfield, Esq., U. S. Atty., moved that defendant Joe Parente be called and that the order heretofore entered continuing case to January 4, 1928, be vacated, to which motion and order T. J. Riordan, Esq., attorney on behalf of said defendant, objected to such procedure and moved for continuance of trial of this case. Court ordered objection overruled and said order continuing case to January 4, 1928, be and same is hereby vacated, and ordered that the motion for continuance of trial be and is hereby denied, to which orders exceptions be entered.

Further ordered that defendant Joe Parente be called, and being called and failing to answer, on motion of Mr. Hatfield, the Court ordered that the bonds heretofore given for appearance of said

defendant Joe Parente herein be and the same are hereby forfeited unto the United States of America. [4]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 27th day of March, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 27, 1928—ORDER FOR WRIT OF SCIRE FACIAS.

On motion of W. A. O'Brien, Esq., Assistant United States Attorney, IT IS ORDERED that a writ of scire facias issue directed to the sureties on the bond of Joe Parente. [5]

[Title of Court and Cause.]

WRIT OF SCIRE FACIAS.

The President of the United States of America, To the Marshal of the United States of America for the Northern District of California, GREETING:

WHEREAS, on the 5th day of July, A. D. 1927, Joseph Parente, as principal, and New Amsterdam

Casualty Company (a Corporation), as surety, came before Thomas E. Hayden, a United States Commissioner at San Francisco, California, and then and there, as such principal and surety, acknowledged themselves to be jointly and severally bound to the United States in the sum of Twenty Thousand Dollars ($20,000.00), under and through that certain recognizance of which a full and true copy is annexed hereto and made part hereof and marked Exhibit "A"; and

WHEREAS, afterwards, to wit, on the 19th day of December, 1927, the said principal was regularly required to answer the criminal charge specifically mentioned in said Exhibit "A," but answered not and did not appear, and his said surety, being then regularly required to produce him, produced him not, and breached the condition of said recognizance; and

WHEREAS, on the 19th day of December, 1927, by reason of the premises hereinabove, the said recognizance was forfeited to the United States:

WHEREFORE, on motion of the United States Attorney for the Northern District of California, and good cause appearing therefor, it is considered and adjudged that the United States have and recover the said sum of Twenty Thousand Dollars ($20,000.00) of and from the said principal and the said surety, jointly and severally, together with costs herein; and

WE THEREFORE COMMAND YOU that you make known to the said principal and to the same surety that they are required to be before our

United States District Court, Northern District of [6] California, Southern Division, at a court to be holden on the 16th day of April, 1928, at 10 A. M., at the Post Office Building in San Francisco, California, then and there to show cause, if any they have, why judgment upon the said recognizance, forfeited as aforesaid, should not be made absolute and execution issue thereon.

And have you then and there this writ, with your return thereon endorsed; and herein fail not.

WITNESS, the Honorable A. F. ST. SURE, Judge of the District Court of the United States, Northern District of California, this 27th day of March, A. D. 1928, and of our Independence the 152d.

ATTEST my hand and the seal of said District Court the day and year last above written.

[Seal] WALTER B. MALING,
Clerk.
By M. E. Van Buren,
Deputy Clerk. [7]

EXHIBIT "A."

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, That we, JOE PARENTE, as principal, and NEW AMSTERDAM CASUALTY COMPANY and ....., as sureties, are held and firmly bound unto the United States of America, in the sum of TWENTY THOUSAND DOLLARS ($20000) *Dollars,* to be paid to the said United States of

America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

SEALED with our seals and dated the 5th day of July, in the year of our Lord one thousand nine hundred and twenty seven:

THE CONDITION of the above recognizance is such, that, whereas, an Indictment has been found by the United States Grand Jury for the Southern Division of the Northern District of California, and filed on the 28th day of June, A. D. 1927, in the Southern Division of the United States District Court for the Northern District of California, charging the said Joe Parente with Viol. Act October 28, 1919 (National Prohibition Act) committed on or about the .... day of ....., A. D. 192...., to wit, at the District and Division aforesaid.

AND WHEREAS, the said Joe Parente has been required to give a recognizance, with sureties, in the sum of Twenty Thousand Dollars ($20000) *Dollars* for his appearance before said United States District Court whenever required. [8]

NOW, THEREFORE, if the said Joe Parente shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the courtroom of said Court in the City and County of San Francisco, on the 14th day of July, A. D. 1927, at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may

be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void; otherwise, to remain in full effect and virtue.

JOE PARENTE. (Seal)
Address: 731–14th Ave.
NEW AMSTERDAM CASUALTY CO. (Seal.)
By GEO. W. POULTNEY, (Seal)
Atty.-in-fact.

Acknowledged before me and APPROVED the day and year first above written.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California, at San Francisco.

Name and Address of Attorney for Defendant:
THOS. J. RIORDAN. Address: Hobart Bldg.
[9]

U. S. MARSHAL'S RETURN.

I hereby certify and return that I received the within writ on the 29th of March, 1928, and herewith return the same unexecuted, for the reason that service of same was held up at the request of the U. S. Attorney, who was awaiting instructions from the Attorney General relative to service of

same, and further that the return date of April 16, 1928, has now expired.

FRED L. ESOLA,
U. S. Marshal.
By John A. Roseen,
Deputy.

April 18, 1928, San Francisco, Calif.

[Endorsed]: Filed Apr. 18, 1928. [10]

[Title of Court and Cause.]

PRAECIPE FOR ALIAS WRIT OF SCIRE FACIAS.

To the Clerk of Said Court:

Sir: Please issue alias writ of scire facias.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 20, 1928. [11]

[Title of Court and Cause.]

ALIAS WRIT OF SCIRE FACIAS.

The President of the United States of America, To the Marshal of the United States of America for the Northern District of California, GREETING:

WHEREAS, on the 5th day of July, A. D. 1927, Joseph Parente, as principal, and New Amsterdam Casualty Company (a corporation), as surety, came

before Thomas E. Hayden, a United States Commissioner at San Francisco, California, and then and there, as such principal and surety, acknowledged themselves to be jointly and severally bound to the United States in the sum of Twenty Thousand Dollars ($20,000.00), under and through that certain recognizance of which a full and true copy is annexed hereto and made part hereof and marked Exhibit "A"; and

WHEREAS, afterwards, to wit, on the 19th day of December, 1927, the said principal was regularly required to answer the criminal charge specifically mentioned in said Exhibit "A," but answered not and did not appear, and his said surety, being then regularly required to produce him, produced him not, and breached the condition of said recognizance; and

WHEREAS, on the 19th day of —— December, 1927, by reason of the premises hereinabove, the said recognizance was forfeited to the United States:

WHEREFORE, on motion of the United States Attorney for the Northern District of California, and good cause appearing therefor, it is considered and adjudged that the United States have and recover the said sum of Twenty Thousand Dollars ($20,000.00) of and from the said principal and the said surety, jointly and severally, together with costs herein; and

WE THEREFORE COMMAND YOU as before you were commanded that you make known to the said principal and to the same surety that they are required to be before our United States District

Court, Northern District of [12] California, Southern Division; at a court to be holden on the 5th day of May, 1928, at 10 A. M. at the Post Office Building in San Francisco, California, then and there to show cause, if any they have, why judgment upon the said recognizance, forfeited as aforesaid, should not be made absolute and execution issue thereon.

And have you then and there this writ, with your return thereon endorsed; and herein fail not.

WITNESS, the Honorable A. F. ST. SURE, Judge of the District Court of the United States, Northern District of California, this 20th day of April, A. D. 1928, and of our Independence the 152d.

ATTEST my hand and the seal of said District Court the day and year last above written.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [13]

EXHIBIT "A."

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, That we, JOE PARENTE, as principal, and NEW AMSTERDAM CASUALTY COMPANY and ....., as Sureties, are held and firmly bound unto the United States of America, in the sum of TWENTY THOUSAND DOLLARS ($20,000) *Dollars,* to be paid to the said United States of

America, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

SEALED with our seals and dated the 5th day of July, in the year of our Lord one thousand nine hundred and twenty-seven.

THE CONDITION of the above recognizance is such, that, whereas, an Indictment has been found by the United States Grand Jury for the Southern Division of the Northern District of California, and filed on the 28th day of June, A. D. 1927, in the Southern Division of the United States District Court for the Northern District of California, charging the said Joe Parente with Viol. Act October 28, 1919 (National Prohibition Act) committed on or about the .... day of ....., A. D. 192...., to wit, at the District and Division aforesaid.

AND WHEREAS, the said Joe Parente has been required to give a recognizance, with sureties, in the sum of Twenty Thousand Dollars ($20,000) *Dollars* for his appearance before said United States District Court whenever required. [14]

NOW, THEREFORE, If the said Joe Parente shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the Courtroom of said court in the City and County of San Francisco, on the 14th day of July, A. D. 1927, at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may

be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void; otherwise, to remain in full effect and virtue.

JOE PARENTE. (Seal)
Address: 731–14th Ave.
NEW AMSTERDAM CASUALTY CO. (Seal)
By GEO. W. POULTNEY, (Seal)
Atty-in-fact.

Acknowledged before me and APPROVED the day and year first above written.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California, at San Francisco.

Name and Address of Attorney for Defendant:
THOS. J. RIORDAN. Address: Hobart Bldg.

[Endorsed]: Filed Apr. 28, 1928. [15]

U. S. MARSHAL'S RETURN.

18,827.

Northern District of California,—ss.

I hereby certify and return that on the 25 day of April, 1928, I received the within alias writ of scire facias and that after diligent search I am

unable to find the within named defendants Joe Parente within my district.

FRED L. ESOLA,
United States Marshal.
By WM. J. O'FARRELL,
Deputy United States Marshal.

RETURN ON SERVICE OF WRIT.

18,827.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed alias writ of scire facias on the therein named New Amsterdam Casualty Company, a corporation, by handing to and leaving a true and correct copy thereof with Walter W. Derr, resident vice-president, personally, at San Francisco, in said District, on the 25 day of April, A. D. 1928.

FRED L. ESOLA,
U. S. Marshal.
By WM. J. O'FARRELL,
Deputy. [16]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 5th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 5, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO MAY 14, 1928.

This day being the day for the return on the writ of scire facias issued herein, F. E. Boland, Esq., appeared as attorney for the New Amsterdam Casualty Company. After hearing Mr. Boland, IT IS ORDERED that this matter be continued to May 14, 1928, to which order E. R. Bonsall, Esq., Asst. U. S. Atty., then and there duly excepted. [17]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 14th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 14, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO MAY 24, 1928.

Continued to May 24, 1928, for hearing on return to writ, etc. [18]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 24th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 24, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO AUGUST 6, 1928.

Continued to Aug. 6, 1928, for hearing on return to writ, etc. [19]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 6th day of August, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—AUGUST 6, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO AUGUST 11, 1928.

After hearing attorneys, case continued to Aug. 11, 1928, for hearing on return to writ, etc. [20]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 11th day of August, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable WILLIAM H. HUNT, Judge.

[Title of Cause.]

MINUTES OF COURT—AUGUST 11, 1928—ORDER CONTINUING HEARING ON WRITS OF SCIRE FACIAS IN THREE CASES TO SEPTEMBER 4, 1928.

ORDERED that the matter of the returns to writ of scire facias, in the three above-entitled cases, be and the same are hereby continued to Sept. 4, 1928, for hearing. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 4th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 4, 1928 —ORDER SUBMITTING RETURN TO WRIT OF SCIRE FACIAS.

After hearing F. E. Boland, Esq., attorney for surety, and Geo. M. Naus, Esq., Asst. U. S. Atty., the Court ordered that the return to writ, etc., be and same is hereby submitted. [22]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 5th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 5, 1928 —ORDER FOR JUDGMENT ABSOLUTE.

IT IS ORDERED that the petition for remission, under Section 1020, R. S., heretofore submitted be and the same is hereby denied and that a judgment *nisi* for the forfeiture of the bond given for the appearance of defendant Joseph J. Parente be entered and made absolute. [23]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,827.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PARENTE et al.,

Defendants.

JUDGMENT ABSOLUTE ON SCIRE FACIAS.

A writ of scire facias having heretofore been regularly issued in this cause, requiring the persons hereinafter in this judgment specifically named to show cause, if any they had, why the judgment *nisi* heretofore rendered should not be made absolute, upon the recognizance specifically described in the said writ, and the matter now being regularly

before this Court for judgment, and none of said persons having shown cause,—

IT IS CONSIDERED AND ADJUDGED that the said judgment *nisi* be and it hereby is made absolute, and that execution issue thereon, in the sum of $20,000.00, with costs taxed in the sum of $———, in favor of the United States of America, to make the said sums out of the property of Joseph Parente and New Amsterdam Casualty Company, a corporation.

Done in open court this 6th day of September, 1928.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed Sep. 6, 1928.

Entered in Vol. 23, Judg. and Decrees, at Page 202. [24]

[Title of Court and Cause.]

STIPULATION RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the above-named plaintiff and the defendant New Amsterdam Casualty Company, a corporation, that the defendant New Amsterdam Casualty Company may have to and including the first day of October, 1928, within which to prepare its proposed bill of exceptions for use on appeal from the judgment which has been heretofore entered herein.

Dated: September 13, 1928.

GEO. J. HATFIELD,
U. S. Atty.,
GEO. M. NAUS,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

KNIGHT, BOLAND & CHRISTIN,
Attorneys for New Amsterdam Casualty Company.

[Endorsed]: Filed Sep. 20, 1928. [25]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 5, 1928, TO PREPARE AND FILE BILL OF EXCEPTIONS.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the defendant and appellant, New Amsterdam Casualty Company, a corporation, may have to and including the 5th day of October, 1928, within which to prepare its proposed bill of exceptions for use on appeal from the judgment which has been heretofore entered herein.

Dated: September 29th, 1928.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed Sep. 29, 1928. [26]

[Title of Court and Cause.]

ORDER CONTINUING JURISDICTION OF COURT TO SETTLE BILL OF EXCEPTIONS ON APPEAL.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the jurisdiction of this Court to act upon and settle the bill of exceptions on appeal of defendant New Amsterdam Casualty Company, a corporation, is hereby continued from the present term to and including the next ensuing full term, to wit, the November, 1928, term of said court.

Dated: San Francisco, California, October 1, 1928.

FRANK KERRIGAN,
United States District Judge.

[Endorsed]: Filed Oct. 2, 1928. [27]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 2, 1928, FOR TRANSMITTAL OF RECORD ON APPEAL AND DOCKETING CAUSE.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time within which the record on appeal shall be transmitted by the Clerk of the District Court to the Circuit Court of Appeals and the cause docketed therein

is hereby extended to and including the 2d day of November, 1928.

FRANK H. KERRIGAN,
Judge of the U. S. District Court.

[Endorsed]: Filed Oct. 24, 1928. [28]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit, on the 4th day of September, 1928, the return to the writ of scire facias came on for hearing before the Honorable Frank H. Kerrigan, one of the Judges of the above-entitled court, sitting without a jury; plaintiff appearing by George J. Hatfield and G. M. Naus, its attorneys, and the defendant, New Amsterdam Casualty Company, appearing by F. Eldred Boland, its attorney, and defendant Joseph J. Parente not appearing in person or by attorney.

Thereupon, the following proceedings took place:

Mr. Boland, in open court, served upon the United States Attorney, a petition in behalf of New Amsterdam Casualty Company for remission of forfeiture, and filed it with the Clerk, and stated to the Court that said New Amsterdam Casualty Company had filed in the proceeding its answer to the writ of scire facias and asked the Court that [29] the matter be set down for a date certain for trial.

Thereupon, Mr. Naus, Assistant United States Attorney, moved on behalf of plaintiff, first, that in the scire facias proceedings the judgment *nisi* be made absolute upon the face of the writ and return upon the ground that the return did not deny the matters of record upon which the writ was based, and the affirmative matter in the return was insufficient in substance to state any defense; and secondly, that the petition for remission, being necessarily founded upon Section 1020 of the Revised Statutes, was necessarily bad and insufficient in that it affirmatively showed a wilful default of the party within the meaning of said Section 1020.

Mr. Boland asked that the petition of New Amsterdam Casualty Company for remission of forfeiture be set for a date certain for hearing, in order that it might formally present the petition with appropriate evidence.

Thereupon, the Court asked Mr. Boland the points of defense to the writ of scire facias, and the grounds of the petition for remission of forfeiture, and thereupon argument took place between counsel, at the conclusion of which the Court ordered the matter submitted; and after consideration it was ordered that the petition for remission be denied, and that the judgment *nisi* be made absolute; and exceptions were taken to both rulings.

No evidence, oral or documentary, was submitted.

Dated: October 26th, 1928.

FRANK H. KERRIGAN,
United States District Judge. [30]

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correct.

GEO. J. HATFIELD,
United States Attorney.
GEO. M. NAUS,
Assistant United States Attorney.
F. ELDRED BOLAND,
F. J. KILMARTIN,
Attorneys for Defendant New Amsterdam Casualty Company.

[Endorsed]: Filed Oct. 26, 1928. [31]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The New Amsterdam Casualty Company, a corporation, one of the defendants in the above-entitled action, feeling itself aggrieved by the decision of the Court granting to plaintiff judgment as prayed for in its writ of scire facias, and by the judgment of the Court entered herein on the 6th day of September, 1928, wherein it was and is ordered, adjudged and decreed that said plaintiff recover of and from said defendant the New Amsterdam Casualty Company, the sum of Twenty Thousand ($20,000) Dollars and costs; and feeling itself aggrieved for that in and by said decision and judgment and for that in said action certain errors were committed to the prejudice of said defendant, all of which will more in detail appear from the as-

signment of errors which defendant has filed with this petition,

COMES NOW by Messrs. F. Eldred Boland and F. J. Kilmartin, its attorneys, and petitions said Court for an order allowing said defendant to prosecute an appeal to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that [32] behalf made and provided; and also that an order be made fixing the amount of security which the said defendant shall furnish upon said appeal, and also that a transcript of the record, proceedings and papers in this action, duly authenticated, may be sent to said Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said Circuit Court of Appeals.

And your petitioner will ever pray, etc.

F. ELDRED BOLAND,
F. J. KILMARTIN,
Attorneys for Defendant New Amsterdam Casualty Company.

[Endorsed]: Filed Sep. 27, 1928. [33]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now defendant New Amsterdam Casualty Company and files the following assignments of error upon which it will rely on its prosecution of

its appeal in the above-entitled cause from the decree made by this Honorable Court on the 6th day of September, 1928.

1. That the United States District Court for the Southern Division of the Northern District of California erred in granting judgment for the plaintiff and respondent.

2. That said Court erred in refusing to grant judgment for the defendant and appellant.

3. That said Court had no jurisdiction to make said judgment.

4. That said Court erred in giving judgment for plaintiff without a trial of the case.

WHEREFORE appellant prays that said judgment be reversed and that the United States District Court for the Northern District of California, Southern Division, be ordered to enter a [34] judgment and order reversing said decision in said cause.

F. ELDRED BOLAND,
F. J. KILMARTIN,

Attorneys Defendant New Amsterdam Casualty Company.

[Endorsed]: Filed Sep. 27, 1928. [35]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of F. Eldred Boland, Esq., attorney for the above-named petitioner and defendant New

Amsterdam Casualty Company, and upon filing a petition for appeal,—

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein on the 6th day of September, 1928, in favor of plaintiff and against defendant the New Amsterdam Casualty Company, and that the amount of bond on said writ of error be and the same is hereby fixed at $250.00.

Dated: September 27th, 1928.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Sep. 27, 1928. [36]

[Title of Court and Cause.]

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That the New Amsterdam Casualty Company, a corporation, as principal, and the American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the above-named plaintiff, United States of America, in the sum of Twenty-five Thousand ($25,000) Dollars, lawful money of the United States, to be paid to the said United States of America, and for payment of which well and truly to be made the said principal and the said surety bind themselves and each of them, and respectively their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of September, 1928.

WHEREAS, the principal herein, being one of the defendants in the above-entitled action, being about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, from the judgment entered in the above-entitled action in [37] the Southern Division of the United States District Court for the Northern District of California, Second Division, on the 6th day of September, 1928, in favor of said United States of America and against New Amsterdam Casualty Company, a corporation,—

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal shall prosecute its said appeal to effect and answer all damages and costs if it fails to make said appeal good, and if said judgment shall be affirmed by said Circuit Court of Appeals and shall be complied with in all respects by the said defendant herein New Amsterdam Casualty Company, a corporation, or if said judgment shall be affirmed in part or modified by said Circuit Court of Appeals and shall be complied with in all respects by said defendant as so affirmed in part or modified, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

IT IS EXPRESSLY AGREED by the surety hereto that in case of the breach of any condition hereof the above-entitled court may, upon notice to said surety of not less than ten days, proceed

summarily in the above-entitled action to ascertain the amount said surety is bound to pay on account of such breach and render judgment therefor against it and award execution thereof.

IN WITNESS WHEREOF the undersigned, the New Amsterdam Casualty Company, a corporation, as principal, and the undersigned American Surety Company of New York, a corporation, as surety, have caused their corporate names and seals to be hereunto affixed by their respective attorneys-in-fact [38] thereunto duly authorized this 19th day of September, 1928.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,
By WALTER W. DERR, (Seal)
Its Attorney-in-fact,
Principal.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
By R. D. WELDON,
Resident Vice-President.
[Seal] Attest: B. DUCRAY,
Resident Assistant Secretary.

Approved:
FRANK H. KERRIGAN,
United States District Judge. [39]

State of California,
City and County of San Francisco,—ss.

On this 27th day of September, in the year of our Lord one thousand nine hundred and twenty-eight, before me, Frank L. Owen, a notary public in and for said city and county and state, residing therein,

duly commissioned and sworn, personally appeared Walter W. Derr, known to me to be the person whose name is subscribed to the within instrument, as the attorney-in-fact of New Amsterdam Casualty Company, and acknowledged to me that he subscribed the name of New Amsterdam Casualty Company thereto as principal, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county and state aforesaid, the day and year in this certificate first above written.

[Seal] FRANK L. OWEN,
Notary Public in and for said City and County of San Francisco, State of California.

State of California,
City and County of San Francisco,—ss.

On this nineteenth day of September, in the year one thousand nine hundred and twenty-eight, before me, John McCallan, a notary public in and for said city and county, state aforesaid, residing therein, duly commissioned and sworn, personally appeared R. D. Weldon and B. Ducray, known to me to be the resident vice-president and resident assistant secretary respectively of the [40] American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires 4–12–29.

[Endorsed]: Filed Sep. 27, 1928.

Premium charged for this bond is $250.00 per annum. [41]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 41 pages, numbered from 1 to 41, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of Joseph J. Parente et al., No. 18,827, as the same now remain on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Fourteen Dollars and Sixty Cents ($14.60), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 1st day of November, A. D. 1928.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [42]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to United States of America, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's office of the United States District Court for the Northern District of California, wherein New Amsterdam Casualty Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the North-

ern District of California, this 27th day of September, A. D. 1928.

FRANK H. KERRIGAN,
United States District Judge. [43]

Service and receipt of a copy of the within citation is hereby admitted this 27 day of Sept., 1928.

GEO. J. HATFIELD,
For U. S.

[Endorsed]: Filed Sep. 27, 1928. [44]

[Endorsed]: No. 5620. United States Circuit Court of Appeals for the Ninth Circuit. New Amsterdam Casualty Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 1, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5621

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5621

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Alias Writ of Scire Facias..... 9

Assignments of Error..... 26

Certificate of Clerk U. S. District Court to Transcript of Record..... 32

Citation on Appeal..... 33

Engrossed Bill of Exceptions..... 23

EXHIBITS:

Exhibit "A" Attached to Writ of Scire Facias—Bond 6

Exhibit "A" Attached to Alias Writ of Scire Facias—Bond 11

Judgment Absolute on Scire Facias..... 20

Minutes of Court—December 22, 1927—Order Forfeiting Bonds, etc. 3

Minutes of Court—March 27, 1928—Order for Writ of Scire Facias..... 4

Minutes of Court—May 5, 1928—Order Continuing Hearing on Writ of Scire Facias to May 14, 1928..... 15

Minutes of Court—May 14, 1928—Order Continuing Hearing on Writ of Scire Facias to May 24, 1928..... 16

Index.

Page

Minutes of Court—May 24, 1928—Order Continuing Hearing on Writ of Scire Facias to August 6, 1928 16

Minutes of Court—August 6, 1928—Order Continuing Hearing on Writ of Scire Facias to August 11, 1928 17

Minutes of Court — August 11, 1928 — Order Continuing Hearing on Writs of Scire Facias in Three Cases to September 4, 1928 18

Minutes of Court—September 4, 1928—Order Submitting Return to Writ of Scire Facias 18

Minutes of Court—September 5, 1928—Order for Judgment Absolute 19

Names and Addresses of Attorneys of Record 1

Order Allowing Appeal 27

Order Continuing Hearing on Writ of Scire Facias to May 14, 1928 15

Order Continuing Hearing on Writ of Scire Facias to May 24, 1928 16

Order Continuing Hearing on Writ of Scire Facias to August 6, 1928 16

Order Continuing Hearing on Writ of Scire Facias to August 11, 1928 17

Order Continuing Hearing on Writs of Scire Facias in Three Cases to September 4, 1928 18

Order Continuing Jurisdiction of Court to Settle Bill of Exceptions on Appeal 21

Order Extending Time to and Including October 5, 1928, to Prepare and File Bill of Exceptions 21

Index. Page

Order Extending Time to and Including November 2, 1928, for Transmittal of Record on Appeal and Docketing Cause..... 22
Order Forfeiting Bonds, etc. 3
Order for Judgment Absolute..... 19
Order for Writ of Scire Facias..... 4
Order Submitting Return to Writ of Scire Facias 18
Petition for Appeal..... 25
Praecipe for Alias Writ of Scire Facias..... 9
Praecipe for Transcript of Record..... 1
Supersedeas Bond 28
Writ of Scire Facias..... 4

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For New Amsterdam Casualty Co., Appellant:
KNIGHT, BOLAND & CHRISTIN, Esqs., F. ELDRED BOLAND, Esq., and F. J. KILMARTIN, Esq.

For United States, Appellee:
U. S. ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,277.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH J. PARENTE and NEW AMSTERDAM CASUALTY COMPANY, a Corporation,
Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please make up the record on appeal heretofore sued out and include therein:

Writ of scire facias.

Praecipe for alias writ of scire facias.

Alias writ of scire facias.

Minute orders continuing writ of scire facias for hearing.
Minute orders of September 4 and 5, 1928.
Minute orders of December 17 and 22, 1927, and March 27, 1928.
Judgment absolute.
Stipulation extending time for preparation of bill of exceptions. [1*]
Orders extending time to prepare bill of exceptions.
Order continuing jurisdiction to settle bill of exceptions.
Order extending time to docket cause on appeal.
Petition on appeal.
Assignments of error.
Citation on appeal.
Order allowing appeal.
Bond on appeal.
Bill of exceptions.
This praecipe.

Dated: October 26th, 1928.

F. ELDRED BOLAND,
F. J. KILMARTIN,
Attorneys for Defendant New Amsterdam Casualty Company.

Receipt of a copy of the within praecipe is hereby admitted this —— day of October, 1928.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 26, 1928. [2]

*Page-number appearing at the foot of page of original certified Transcript of Record.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 22d day of December, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—DECEMBER 22, 1927 —ORDER FORFEITING BONDS, etc.

This case came on regularly for trial. Counsel for defendants being present, Geo. J. Hatfield, Esq., U. S. Atty., moved that defendant Joe Parente be called and that the order heretofore entered continuing case to January 4, 1928, be vacated, to which motion and order T. J. Riordan, Esq., attorney on behalf of said defendant, objected to such procedure and moved for continuance of trial of this case. Court ordered objection overruled and said order continuing case to January 4, 1928, be and same is hereby vacated, and ordered that the motion for continuance of trial be and is hereby denied, to which orders exceptions be entered.

Further ordered that defendant Joe Parente be called, and being called and failing to answer, on motion of Mr. Hatfield, the Court ordered that the bonds heretofore given for appearance of said

defendant Joe Parente herein be and the same are hereby forfeited unto the United States of America. [3]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 27th day of March, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 27, 1928—ORDER FOR WRIT OF SCIRE FACIAS.

On motion of W. A. O'Brien, Esq., Assistant United States Attorney, IT IS ORDERED that a writ of scire facias issue directed to the sureties on the bond of Joe Parente. [4]

[Title of Court and Cause.]

WRIT OF SCIRE FACIAS.

The President of the United States of America, To the Marshal of the United States of America for the Northern District of California, GREETING:

WHEREAS, on the 1st day of December, A. D. 1926, Joseph J. Parente, as principal, and New Amsterdam Casualty Company, as surety, came

before Thomas E. Hayden, United States Commissioner, at San Francisco, California, and then and there, as such principal and surety, acknowledged themselves to be jointly and severally bound to the United States in the sum of Twenty Thousand Dollars ($20,000.00), under and through that certain recognizance of which a full and true copy is annexed hereto and made part hereof and marked Exhibit "A"; and

WHEREAS, afterwards, to wit, on the 19th day of December, 1927, the said principal was regularly required to answer the criminal charge specifically mentioned in said Exhibit "A," but answered not and did not appear, and his said surety, being then regularly required to produce him, produced him not, and breached the condition of said recognizance; and

WHEREAS, on the 19th day of December, 1927, by reason of the premises hereinabove, the said recognizance was forfeited to the United States;

WHEREFORE, on motion of the United States Attorney for the Northern District of California, and good cause appearing therefor, it is considered and adjudged that the United States have and recover the said sum of Twenty Thousand Dollars ($20,000.00), of and from the said principal and the said surety, jointly and severally, together with costs herein; and

WE THEREFORE COMMAND YOU that you make known to the said principal and to the same surety that they are required to be before our United States District Court, Northern District of

[5] California, Southern Division, at a court to be holden on the 16th day of April, 1928, at 10 A. M., at the Post Office Building in San Francisco, California, then and there to show cause, if any they have, why judgment upon the said recognizance, forfeited as aforesaid, should not be made absolute and execution issue thereon.

And have you then and there this writ, with your return thereon endorsed; and herein fail not.

WITNESS, the Honorable A. F. ST. SURE, Judge of the District Court of the United States, Northern District of California, this 27th day of March, A. D. 1928, and of our Independence the 152d.

ATTEST my hand and the seal of said District Court the day and year last above written.

[Seal] WALTER B. MALING,
Clerk.
By M. E. Van Buren,
Deputy Clerk. [6]

EXHIBIT "A."

18,277.

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, That we, JOSEPH J. PARENTE, as principal, and NEW AMSTERDAM CASUALTY COMPANY and ....., as sureties, are held and firmly bound unto the United States of America, in the sum of TWENTY THOUSAND (20,000) DOLLARS, to be paid to the said United States of

America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

SEALED with our seals and dated the 1st day of December, in the year of our Lord one thousand nine hundred and twenty-six.

THE CONDITION of the above recognizance is such, that, whereas, an Indictment has been found by the United States Grand Jury for the Southern Division of the Northern District of California, and filed on the 30th day of November, A. D. 1926, in the Southern Division of the United States District Court for the Northern District of California, charging the said Joseph J. Parente with Viol. Sec. 37 C. C. of U. S. (Consp. to Viol. Act of 10/28/26 and Tariff Act of 1922), committed on or about the .... day of ....., A. D. 192...., to wit, at the District and Division aforesaid.

AND WHEREAS, the said JOSEPH J. PARENTE has been required to give a recognizance, with sureties, in the sum of Twenty Thousand (20,000) Dollars for his appearance before said United States District Court whenever required. [7]

NOW, THEREFORE, if the said Joseph J. Parente shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the courtroom of said Court in the City and County of San Francisco, on the 14th day of December, A. D. 1926, at ten o'clock in the forenoon of that day, and afterwards whenever or

wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void; otherwise, to remain in full effect and virtue.

JOS. J. PARENTE. (Seal)
Address:

NEW AMSTERDAM CASUALTY COMPANY. (Seal)
By GEO. W. POULTNEY, (Seal)
Agent and Attorney-in-fact.

Acknowledged before me and APPROVED the day and year first above written.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California at San Francisco.

Name and Address of Attorney for Defendant.
Thos. J. Riordan. Address: Hobart Bldg. (Seal)

[8]

U. S. MARSHAL'S RETURN.

I hereby certify and return that I received the within writ on the 29th of March, 1928, and herewith return the same Unexecuted for the reason

---

that service of same was held up at the request of the U. S. Attorney, who was awaiting instructions from the Attorney General relative to service of

same, and further that the return date of April 16, 1928, has now expired.

FRED L. ESOLA,
U. S. Marshal.
By John A. Roseen,
Deputy.

April 18, 1928. San Francisco, Calif.

[Endorsed]: Filed Apr. 18, 1928. [9]

[Title of Court and Cause.]

PRAECIPE FOR ALIAS WRIT OF SCIRE FACIAS.

To the Clerk of Said Court:

Sir: Please issue alias writ of scire facias.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 20, 1928. [10]

[Title of Court and Cause.]

ALIAS WRIT OF SCIRE FACIAS.

The President of the United States of America, to the Marshal of the United States of America for the Northern District of California, GREETING:

WHEREAS, on the 1st day of December, A. D. 1926, ————, as principal, and New Amsterdam Casualty Company, as surety, came before Thomas E. Hayden, United States Commissioner at San

Francisco, California, and then and there, as such principal and surety, acknowledged themselves to be jointly and severally bound to the United States in the sum of Twenty Thousand Dollars ($20,000.00), under and through that certain recognizance of which a full and true copy is annexed hereto and made a part hereof and marked Exhibit "A"; and

WHEREAS, afterwards, to wit, on the 19th day of December, 1927, the said principal was regularly required to answer the criminal charge specifically mentioned in said Exhibit "A," but answered not and did not appear, and his said surety, being then regularly required to produce him, produced him not, and breached the condition of said recognizance; and

WHEREAS, on the 19th day of December, 1927, by reason of the premises hereinabove, the said recognizance was forfeited to the United States;

WHEREFORE, on motion of the United States Attorney for the Northern District of California, and good cause appearing therefor, it is considered and adjudged that the United States have and recover the said sum of Twenty Thousand Dollars ($20,000.00), of and from the said principal and the said surety, jointly and severally, together with costs herein; and

WE THEREFORE COMMAND YOU as before you were commanded that you make known to the said principal and to the same surety that they are required to be before our United States District Court, Northern District of [11] California,

Southern Division, at a court to be holden on the 5th day of May, 1928, A. M., at the Post Office Building in San Francisco, California, then and there to show cause, if any they have, why judgment upon the said recognizance, forfeited as aforesaid, should not be made absolute and execution issue thereon.

And have you then and there this writ, with your return thereon endorsed; and herein fail not.

WITNESS, the Honorable A. F. ST. SURE, Judge of the District Court of the United States, Northern District of California, this 20th day of April, A. D. 1928, and of our Independence the 152d.

ATTEST my hand and the seal of said District Court the day and year last above written.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

[Endorsed]: Filed Apr. 28, 1928.

M. D. No. 33275—Crim.

Received Apr. 21, 1928. U. S. Marshal's Office, San Francisco, Calif. [12]

EXHIBIT "A."

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, That we, JOSEPH J. PARENTE, as principal, and NEW AMSTERDAM CASUALTY COM-

PANY and ....., as sureties, are held and firmly bound unto the United States of America, in the sum of TWENTY THOUSAND (20,000) DOLLARS, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

SEALED with our seals and dated the 1st day of December, in the year of our Lord one thousand nine hundred and twenty-six.

THE CONDITION of the above recognizance is such, that, whereas, an Indictment has been found by the United States Grand Jury for the Southern Division of the Northern District of California, and filed on the 30th day of November, A. D. 1926, in the Southern Division of the United States District Court for the Northern District of California, charging the said Joseph J. Parente with Viol. Sec. 37 C. C. of U. S. (Consp. to Viol. Act of 10–28–26 and Tariff Act of 1922), committed on or about the .... day of ....., A. D. 192——, to wit, at the District and Division aforesaid.

AND WHEREAS, the said Joseph J. Parente has been required to give a recognizance, with sureties, in the sum of Twenty Thousand (20,000) Dollars for his appearance before said United States District Court whenever required. [13]

NOW, THEREFORE, if the said Joseph J. Parente shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to

be holden at the courtroom of said court in the City and County of San Francisco, on the 14th day of December, A. D. 1926, at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void; otherwise, to remain in full effect and virtue.

JOS. J. PARENTE. (Seal)
Address:

NEW AMSTERDAM CASUALTY COMPANY. (Seal)
By GEO. W. POULTNEY,
Agent and Attorney-in-fact. (Seal)

Acknowledged before me and APPROVED the day and year first above written.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California, at San Francisco.

Name and Address of Attorney for Defendant.
Thos. J. Riordan. Address: Hobart Bldg. (Seal)

[Endorsed]: Filed Apr. 28, 1928.

M. D. No. 33275—Crim.

Received Apr. 21, 1928. U. S. Marshal's Office, San Francisco, Calif. [14]

U. S. MARSHAL'S RETURN.

Northern District of California,—ss.

I hereby certify and return, that on the 25 day of April, 1928, I received the within summons and that after diligent search I am unable to find the within named defendants, Joe Parente, within my district.

FRED L. ESOLA,
United States Marshal.
By WM. J. O'FARRELL,
Deputy United States Marshal.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed writ of scire facias on the therein named New Amsterdam Casualty Company, a corporation, by handing to and leaving a true and correct copy thereof with Walter W. Derr, resident vice-president, personally, at San Francisco, in said District, on the 25 day of April, A. D. 1928.

FRED L. ESOLA,
U. S. Marshal.
By WM. J. O'FARRELL,
Deputy. [15]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 5th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Court and Cause.]

MINUTES OF COURT—MAY 5, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO MAY 14, 1928.

This day being the day for the return on the writ of scire facias issued herein, F. E. Boland, Esq., appeared as attorney for The New Amsterdam Casualty Company. After hearing Mr. Boland, IT IS ORDERED that this matter be continued to May 14, 1928, to which order E. R. Bonsall, Esq., Asst. U. S. Atty., then and there duly excepted. [16]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 14th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 14, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO MAY 24, 1928.

Continued to May 24, 1928, for hearing on return, to writ, etc. [17]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 24th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 24, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO AUGUST 6, 1928.

Continued to Aug. 6, 1928, for hearing on return to writ, etc. [18]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 6th day of August, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—AUGUST 6, 1928—ORDER CONTINUING HEARING ON WRIT OF SCIRE FACIAS TO AUGUST 11, 1928.

After hearing Attys., case contd. to Aug. 11, 1928, for hearing on return to writ, etc. [19]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 11th day of August, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable WILLIAM H. HUNT, Judge.

[Title of Cause.]

MINUTES OF COURT—AUGUST 11, 1928—ORDER CONTINUING HEARING ON WRITS OF SCIRE FACIAS IN THREE CASES TO SEPTEMBER 4, 1928.

Ordered that the matter of the returns to writ of scire facias, in the three above-entitled cases, be and the same are hereby continued to Sept. 4, 1928, for hearing. [20]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 4th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 4, 1928—ORDER SUBMITTING RETURN TO WRIT OF SCIRE FACIAS.

After hearing F. E. Boland, Esq., attorney for surety, and Geo. M. Naus, Esq., Assist. U. S. Atty., the Court ordered that the return to writ, etc., be and same is hereby submitted. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 5th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Court.]

MINUTES OF COURT—SEPTEMBER 5, 1928—ORDER FOR JUDGMENT ABSOLUTE.

It is ordered that the petition for remission, under Section 1020, R. S., heretofore submitted be and the same is hereby denied and that a judgment *nisi* for the forfeiture of the bond given for the appearance of defendant Joseph J. Parente be entered and made absolute. [22]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,277.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH J. PARENTE et al.,

Defendants.

JUDGMENT ABSOLUTE ON SCIRE FACIAS.

A writ of scire facias having heretofore been regularly issued in this cause, requiring the persons hereinafter in this judgment specifically named to show cause, if any they had, why the judgment *nisi* heretofore rendered, should not be made absolute*ly,* upon the recognizance specifically described in the said writ, and the matter now being regularly before this court for judgment, and none of said persons having shown cause,—

IT IS CONSIDERED AND ADJUDGED that the said judgment *nisi* be and it hereby is made absolute, and that execution issue thereon, in the sum of $20,000.00, with costs taxed in the sum of $———, in favor of the United States of America, to make the said sums out of the property of Joseph J. Parente and New Amsterdam Casualty Company, a corporation.

Done in open court this 6th day of September, 1928.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed Sep. 6, 1928.

Entered in Vol. 23 Judg. and Decrees, at page 202. [23]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 5, 1928, TO PREPARE AND FILE BILL OF EXCEPTIONS.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the defendant and appellant, New Amsterdam Casualty Company, a corporation, may have to and including the 5th day of October, 1928, within which to prepare its proposed bill of exceptions for use on appeal from the judgment which has been heretofore entered herein.

Dated: September 29th, 1928.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed Sep. 29, 1928. [24]

[Title of Court and Cause.]

ORDER CONTINUING JURISDICTION OF COURT TO SETTLING BILL OF EXCEPTIONS ON APPEAL.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the jurisdiction of this Court to act upon and settle the bill of exceptions on appeal of defendant New Amsterdam Casualty Company, a corporation, is hereby continued from the present term to and including the

next ensuing full term, to wit: the November, 1928, term of said court.

Dated: San Francisco, California, October 1st, 1928.

FRANK KERRIGAN.
FRANK KERRIGAN,
United States District Judge.

[Endorsed]: Filed Oct. 2, 1928. [25]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 2, 1928, FOR TRANSMITTAL OF RECORD ON APPEAL AND DOCKETING CAUSE.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time within which the record on appeal shall be transmitted by the Clerk of the District Court to the Circuit Court of Appeal and the cause docketed therein is hereby extended to and including the 2d day of November, 1928.

FRANK H. KERRIGAN,
Judge of the U. S. District Court.

[Endorsed]: Filed Oct. 24, 1928. [26]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit, on the 4th day of September, 1928, the return to the writ of scire facias came on for hearing before the Honorable Frank H. Kerrigan, one of the Judges of the above-entitled court, sitting without a jury; plaintiff appearing by George J. Hatfield and G. M. Naus, its attorneys, and the defendant, New Amsterdam Casualty Company, appearing by F. Eldred Boland, its attorney, and defendant Joseph J. Parente not appearing in person or by attorney.

Thereupon, the following proceedings took place;

Mr. Boland, in open court, served upon the United States Attorney, a petition in behalf of New Amsterdam Casualty Company for remission of forfeiture, and filed it with the clerk, and stated to the Court that said New Amsterdam Casualty Company had filed in the proceeding its answer to the writ of scire facias and asked the Court that [27] the matter be set down for a date certain for trial.

Thereupon, Mr. Naus, Assistant United States Attorney, moved on behalf of plaintiff, first, that in the scire facias proceedings the judgment *nisi* be made absolute upon the face of the writ and return upon the ground that the return did not deny the matters of record upon which the writ was based, and the affirmative matter in the return was insufficient in substance to state any defense; and secondly, that the petition for remission, being necessarily founded upon Section 1020 of the Re-

vised Statutes, was necessarily bad and insufficient in that it affirmatively showed a wilful default of the party within the meaning of said Section 1020.

Mr. Boland asked that the petition of New Amsterdam Casualty Company for remission of forfeiture be set for a date certain for hearing, in order that it might formally present the petition with appropriate evidence.

Thereupon, the Court asked Mr. Boland the points of defense to the writ of scire facias, and the grounds of the petition for remission of forfeiture, and thereupon argument took place between counsel, at the conclusion of which the Court ordered the matter submitted; and after consideration it was ordered that the petition for remission be denied, and that the judgment *nisi* be made absolute; and exceptions were taken to both rulings.

No evidence, oral or documentary, was submitted.

Dated: October 26th, 1928.

FRANK H. KERRIGAN,
United States District Judge. [28]

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correct.

GEO. J. HATFIELD,
United States Attorney.
GEO. M. NAUS,
Assistant United States Attorney.
F. ELDRED BOLAND,
F. J. KILMARTIN,
Attorneys for Defendant New Amsterdam Casualty Company.

[Endorsed]: Filed Oct. 26, 1928. [29]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The New Amsterdam Casualty Company, a corporation, one of the defendants in the above-entitled action, feeling itself aggrieved by the decision of the Court granting to plaintiff judgment as prayed for in its writ of scire facias, and by the judgment of the Court entered herein on the 6th day of September, 1928, wherein it was and is ordered, adjudged and decreed that said plaintiff recover of and from said defendant the New Amsterdam Casualty Company, the sum of Twenty Thousand ($20,000) Dollars and costs; and feeling itself aggrieved for that in and by said decision and judgment and for that in said action certain errors were committed to the prejudice of said defendant, all of which will more in detail appear from the assignment of errors which defendant has filed with this petition,

COMES NOW by Messrs. F. Eldred Boland, and F. J. Kilmartin, its attorneys, and petitions said Court for an order allowing said defendant to prosecute an appeal to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that [30] behalf made and provided; and also that an order be made fixing the amount of security which the said defendant shall furnish upon said appeal, and also that a transcript of the record, proceedings and papers in this action, duly authenticated, may be sent to said Circuit Court

of Appeals for the Ninth Circuit, and that all further proceedings be suspended, stayed and superceded until the determination of said appeal by said Circuit Court of Appeals.

And your petitioner will ever pray, etc.

F. ELDRED BOLAND,
F. J. KILMARTIN,
Attorneys for Defendant New Amsterdam Casualty Company.

[Endorsed]: Filed Sep. 27, 1928. [31]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now defendant New Amsterdam Casualty Company and files the following assignments of error upon which it will rely on its prosecution of its appeal in the above-entitled cause from the decree made by this Honorable Court on the 6th day of September, 1928.

1. That the United States District Court for the Southern Division of the Northern District of California erred in granting judgment for the plaintiff and respondent.

2. That said Court erred in refusing to grant judgment for the defendant and appellant.

3. That said Court had no jurisdiction to make said judgment.

4. That said Court erred in giving judgment for plaintiff without a trial of the case.

WHEREFORE appellant prays that said judgment be reversed and that the United States District Court for the Northern District of California, Southern Division, be ordered to enter a [32] judgment and order reversing said decision in said cause.

F. ELDRED BOLAND,
F. J. KILMARTIN,
Attorneys Defendant New Amsterdam Casualty Company.

[Endorsed]: Filed Sep. 27, 1928. [33]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of F. Eldred Boland, Esq., attorney for the above-named petitioner and defendant New Amsterdam Casualty Company, and upon filing a petition for appeal,—

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein on the 6th day of September, 1928, in favor of plaintiff and against defendant the New Amsterdam Casualty Company, and that the amount of bond on said writ of error be and the same is hereby fixed at $250.00.

Dated: September 27th, 1928.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Sep. 27, 1928. [34]

[Title of Court and Cause.]

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That the New Amsterdam Casualty Company, a corporation, as principal, and the American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the above-named plaintiff, United States of America, in the sum of Twenty-five Thousand ($25,000) Dollars, lawful money of the United States, to be paid to the said United States of America, and for payment of which well and truly to be made the said principal and the said surety bind themselves and each of them, and respectively their successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 19th day of September, 1928.

WHEREAS, the principal herein, being one of the defendants in the above-entitled action, being about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, from the judgment entered in the above-entitled action in [35] the Southern Division of the United States District Court for the Northern District of California, Second Division, on the 6th day of September, 1928, in favor of said United States of America and against New Amsterdam Casualty Company, a corporation,—

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal shall prosecute its said appeal to effect and answer all damages and costs if it fails to make said appeal good, and if said judgment shall be affirmed by said Circuit Court of Appeals and shall be complied with in all respects by the said defendant herein New Amsterdam Casualty Company, a corporation, or if said judgment shall be affirmed in part or modified by said Circuit Court of Appeals and shall be complied with in all respects by said defendant as so affirmed in part or modified, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

IT IS EXPRESSLY AGREED by the surety hereto that in case of the breach of any condition hereof the above-entitled court may, upon notice to said surety of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount said surety is bound to pay on account of such breach and render judgment therefor against it and award execution thereof.

IN WITNESS WHEREOF the undersigned, the New Amsterdam Casualty Company, a corporation, as principal, and the undersigned American Surety Company of New York, a corporation, as surety, have caused their corporate names and seals to be hereunto affixed by their respective attorneys-in-

fact [36] thereunto duly authorized this 19th day of September, 1928.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,
By WALTER W. DERR, (Seal)
Its Attorney-in-fact,
Principal.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation.
By R. D. WELDON,
Resident Vice-President.

[Seal] Attest: B. DUCRAY,
Resident Assistant Secretary.

Approved.

FRANK H. KERRIGAN,
United States District Judge. [37]

State of California,
City and County of San Francisco,—ss.

On this 27th day of September, in the year of our Lord one thousand nine hundred and twenty-eight, before me, Frank L. Owen, a notary public in and for said City and County and State, residing therein, duly commissioned and sworn, personally appeared Walter W. Derr, known to me to be the person whose name is subscribed to the within instrument, as the attorney-in-fact of New Amsterdam Casualty Company and acknowledged to me that he subscribed the name of New Amsterdam Casualty Company thereto as principal and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office

in the City and County and State aforesaid, the day and year in this certificate first above written.

[Seal] FRANK L. OWEN,
Notary Public in and for said City and County of San Francisco, State of California.

State of California,
City and County of San Francisco,—ss.

On this nineteenth day of September, in the year one thousand nine hundred and twenty-eight, before me, John McCallan, a notary public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared R. D. Weldon and B. Ducray, known to me to be the resident vice-president and resident assistant secretary respectively of the [38] American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires 4–12–29.

[Endorsed]: Filed Sep. 27, 1928.

Premium charged for this bond is $250.00 per annum. [39]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 39 pages, numbered from 1 to 39, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of United States vs. Joseph J. Parente et al., No. 18,277, as the same now remain on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of fourteen dollars ($14.00) and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 1st day of November, A. D. 1928.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [40]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to United States of America, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's office of the United States District Court for the Northern District of California, wherein New Amsterdam Casualty Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 27th day of September, A. D. 1928.

FRANK H. KERRIGAN,
United States District Judge. [41]

Service and receipt of a copy of the within citation is hereby admitted this 27 day of Sept., 1928.

GEO. J. HATFIELD,
For U. S.

[Endorsed]: Filed Sep. 27, 1928. [42]

[Endorsed]: No. 5621. United States Circuit Court of Appeals for the Ninth Circuit. New Amsterdam Casualty Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 1, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5622

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and J. D. (JACK) MORRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5622

United States

Circuit Court of Appeals

For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and J. D. (JACK) MORRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of Jack Morrison	8
Assignment of Errors	27
Bill of Exceptions of Defendants	32
Certificate of Clerk U. S. District Court to Transcript of Record	123
Citation on Appeal	107
Cost Bond	108
Diagram—Survey	15
Information	2
Instructions of the Court to the Jury	99
Judgment (George Doran, Jr., and Harold Graves)	23
Judgment (J. D. Morrison)	24
Motion to Suppress Evidence (Dated June 4, 1928)	5
Motion to Suppress Evidence (Dated July 10, 1928)	18
Names and Addresses of Attorneys of Record	1
Notice of Appeal	26
Order Denying Motion to Suppress Evidence	19
Order Fixing Amount of Bonds	31

Index.

Page

Order Settling Bill of Exceptions 106
Petition for Appeal and Order Allowing Same 28
Supersedeas Bond (Geo. Doran, Jr.) 115
Supersedeas Bond (Harold Graves) 111
Supersedeas Bond (J. D. (Jack) Morrison).. 119

TESTIMONY ON BEHALF OF THE GOVERNMENT:

COLLINS, F. P. 61
Cross-examination 63
Redirect Examination 64
DENNY, J. H. 33
Cross-examination 39
Redirect Examination 49
Recross-examination 52
MYERS, B. A. 53
Cross-examination 58

TESTIMONY ON BEHALF OF DEFENDANTS:

DORAN, GEORGE 86
Cross-examination 91
DORAN, MRS. GEORGE 97
GRAVES, HAROLD 72
Cross-examination 76
Redirect Examination 85
SWAN, M. G. 64
Cross-examination 69
Trial 20
Verdict 21

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOHN G. SKINNER, Esq., of Red Lodge, Montana,
Attorney for Defendants and Appellants.

WELLINGTON D. RANKIN, Esq., United States Attorney,
L. V. KETTER, Esq., Assistant U. S. Attorney,
JOHN COLLINS, Esq., Assistant U. S. Attorney,
All of Helena, Montana,
Attorneys for Plaintiff and Appellee.

[1*]

District Court of the United States, District of Montana.

No. 1062.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE DORAN, Jr., HAROLD GRAVES, and J. D. (JACK) MORRISON,
Defendants.

BE IT REMEMBERED that on May 21st, 1928, an information was duly filed herein, which is in the words and figures following, to wit [2]

---

*Page-number appearing at the foot of page of original certified Transcript of Record.

District Court of the United States, District of Montana, Billings Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE DORAN, Jr., HAROLD GRAVES, and J. D. (JACK) MORRISON,
Defendants.

INFORMATION.

BE IT REMEMBERED, that WELLINGTON D. RANKIN, United States Attorney for the District of Montana, on behalf of the United States, comes into the District Court of the United States for the District of Montana, and informs the Court on this —— day of ————, 192—:

FIRST COUNT.

(Manufacture.)

That on or about the 18 day of April, 1928, one GEORGE DORAN, Jr., HAROLD GRAVES and J. D. (JACK) MORRISON, whose true names are to the informant unknown, at and within that certain ranch and buildings connected therewith located on Gold Creek, in Carbon County, and situated on the N.E. ¼ of the N.W. ¼ of the N.E. ¼ and lots 1, 2 and 3, in section 12, township 9 south, range 20 east, M. P. M., all in the county of Carbon, in the State and District of Montana, and within the jurisdiction of this Court, did then and

there wrongfully and unlawfully manufacture intoxicating liquor, to wit, whiskey, the exact quantity and character of which are to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

SECOND COUNT.

(Possession Property.)

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1928, one GEORGE DORAN, Jr., HAROLD GRAVES and J. D. MORRISON, whose true names are to the informant unknown, at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully have and possess property designed for the manufacture of intoxicating liquor, intended for use in violation of Title II of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

THIRD COUNT.

(Possession Liquor.)

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1928, one GEORGE DORAN, Jr., HAROLD GRAVES,

and J. D. MORRISON, whose true names are to the informant unknown, at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully have and possess intoxicating liquor, to wit, whiskey and wine, the exact quantity and character of which are to the informant unknown, intended for use in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

FOURTH COUNT.

(Nuisance.)

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1928, one GEORGE DORAN, Jr., HAROLD GRAVES and J. D. MORRISON, whose true names are to the informant unknown, at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was manufactured and kept in violation of Title II of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WELLINGTON D. RANKIN,

United States Attorney for the District of Montana. [6]

District Court of the United States of America,
District of Montana.

Wellington D. Rankin, being first duly sworn on oath, deposes and says:

That he is duly appointed, qualified, and acting United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he has read the said information and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

WELLINGTON D. RANKIN.

Subscribed and sworn to before me this 19th day of May, 1928.

[Seal] MAE O'DONNELL,
Deputy Clerk, U. S. District Court, District of Montana.

Filed May 21st, 1928. [7]

THEREAFTER, on June 9th, 1928, a motion to suppress the evidence was duly filed herein, being as follows, to wit: [8]

[Title of Court and Cause.]

MOTION TO SUPPRESS EVIDENCE.

Comes now the defendant in the above-entitled action and moves the Court to suppress any and all evidence secured by means of a search of the premises and real estate occupied by said defendant

as a farm and as a private dwelling-house and home, on the 18th day of April, 1928, as appears by the affidavit of said defendant hereto attached and filed in support of this motion, and any evidence of the possession of said articles so acquired by said search, and prohibit the use of the same upon the trial of this cause, and particularly to suppress and prohibit the use of the following described intoxicating liquor, to wit: two barrels of alleged whiskey, and all samples taken from said barrels by said federal agents, alleged and claimed to have been discovered and found on and within the premises of said defendant, and claimed to have been taken at said time, all of which were claimed to have been found and discovered by reason of said search, and deny the Government and the plaintiff the right to introduce any evidence, either by way of oral testimony, or by exhibits of the said intoxicating liquor above described, or otherwise, or anything concerning what was found, discovered, or disclosed by the search and seizure then and there made, for the following reasons and upon the following grounds:

1. That such search and seizures were illegal in that the same were made without warrant or authority of law, and in contravention of defendant's constitutional rights, and the same were made without a search-warrant. [9]

2. That such search and seizures were made without the consent of the said defendant, and against the will of said defendant, and in violation of said defendant's rights, and without the consent

of any person having the right to so consent for said defendant.

3. That said search and seizures were made by certain Federal Prohibition Agents assigned to and employed within the State of Montana, and each and all of said persons were then and there officers, agents and employees of the United States of America, and engaged in the enforcement of the National Prohibition Act on the 18th day of April, 1928, and said search and seizures were conducted and made by said Federal officers, and each and all of them, without a search-warrant issued from any court of competent jurisdiction, or otherwise.

This motion will be based upon the affidavit of the defendant hereto attached, on the records and files in the above-entitled action, and upon oral testimony to be given at the time of the hearing of this motion.

Dated at Red Lodge, Montana, this 4th day of June, A. D. 1928.

JOHN G. SKINNER,
Attorney for Defendant.

To the UNITED STATES OF AMERICA, the Above-named Plaintiff, and to WELLINGTON D. RANKIN, United States District Attorney for the District of Montana:

You will please take notice that the defendant in this action will present the above motion to the Court, at the courtroom in the Federal Building in the city of Billings, Yellowstone County, Montana, at the opening of the next term of said court in said city of Billings at ten o'clock A. M. of said

day, or as soon thereafter as counsel can be heard, and move the Court for the suppression of evidence, as set forth in said motion.

Dated at Red Lodge, Montana, this 4th day of June, A. D. 1928.

JOHN G. SKINNER,
Attorney for Defendant. [10]

[Title of Court and Cause.]

AFFIDAVIT OF JACK MORRISON.

United States of America,
State of Montana,
District of Montana,—ss.

Jack Morrison came before me, and being duly sworn, deposes and says on oath:

1. That he is the defendant named in the above-entitled action.

2. That he is a resident of the county of Carbon and State of Montana.

3. That he was arrested on or about the 19th day of April, 1928, by certain Federal Prohibition Agents, to wit, a Mr. Collins and a Mr. Meyer, on a complaint filed before the United States Commissioner in Billings, Montana, and affiant thereupon entered into a recognizance and bond as required for his appearance at the next term of said court at Billings, Montana; that affiant was charged with violation of the National Prohibition Act.

4. That affiant is the owner of the following described real estate situated in the county of Carbon

and State of Montana, to wit: Lots One, Two and Three, the West Half of the Northeast Quarter, and the Northeast Quarter of the Northwest Quarter, of Section Twelve, Township Nine South, Range Twenty East, Montana Principal Meridian, having acquired said land by purchase on or about the 5th day of February, 1927, and that since on or about that date he has occupied said premises at his home; that affiant is married; that said real estate consists of 160 acres of land under cultivation; that he is the owner of thirty head of cattle, a number of horses, farm machinery, and that the buildings on said premises consist [11] of a four-room dwelling-house, electric lighting, bath, water in the house, and toilet, and there are certain outbuildings, barns and sheds situated thereon.

5. That on or about the 18th day of April, 1928, while affiant was absent from said premises and ranch, certain Federal Prohibition Agents came to said premises and made a search thereof; that on said date affiant had in his employ Harold Graves and George Doran, Jr., who were employed by affiant for the purpose of building a water line consisting of two-inch pipe from the spring situated adjacent to said premises, said pipe-line, when constructed, to be approximately eight hundred yards in length and was being constructed for the purpose of carrying water to the ranch and buildings of said affiant. That neither of said employees of affiant had any authority from said affiant to consent to a search of said premises or any part or portion thereof, but affiant is informed that his said

employees asked said Federal Agents and those making the search, whether or not they had a search-warrant, and were informed that they did not have a search-warrant and that the same was unnecessary. That said premises was not on the 18th day of April, 1928, and has not been used by this defendant for the unlawful sale of intoxicating liquor, neither were said premises or said dwelling-house used for any other business than that of farm home, and the same was not a store, shop, saloon, restaurant, hotel, or boarding-house; and that all of said premises were used in connection with said affiant's residence and home, and for dwelling-house purposes only and as a private dwelling.

6. That affiant is informed that the said agents claim to have found on said premises a still site, so called, or a place where a still had been constructed and also a still; that affiant alleges that there is a still site on said premises which is situated in the southeast corner of the Southwest Quarter of the Northeast Quarter of said Section Twelve, in a gulch or coulee; that affiant had no knowledge that said still was located on his farm and premises until after said search by said officers; that since such time he has caused a survey to be made of the said premises [12] and it appears from said survey that said still site is located thereon. That said premises are enclosed with a fence and that said still site is outside the fence line of said premises; that the same is evidently hidden in a coulee or gulch and is about a quarter

of a mile from the residence and dwelling of said affiant; that said still site has never been used as a still site or for distilling liquor, to the knowledge of affiant, since affiant has owned said premises; that the still and site found by said agents and which was attempted to be burned by said agents of the Government, is located according to said survey, five hundred and forty feet from the north-east corner of Section Twelve, and not on said premises of said affiant, and said place where said still was found was more than one-half mile from affiant's residence and buildings on said premises, and is also outside of any fence line of said affiant's land and real estate; that affiant is informed and therefore states that the Federal Agents found intoxicating liquor on said premises, or liquor that they claimed to be intoxicating, to wit, certain alleged whiskey; that the same was buried in the ground near the barn situated on said premises, at about fifty or sixty feet from said barn; that affiant is informed that the same was buried in the ground, covered with dirt, and that the same was not visible to the agents of the Government or anyone else without a search, and without digging into the ground therefor and uncovering the same; that said agents of the Government had no right or authority to make excavations on said premises or to dig thereon and the said Federal Agents and those assisting them were trespassers upon affiant's property, on said date. That liquor was destroyed by said agents on said premises and the containers left in the ground on said premises so that the same

would be observed by this affiant or anyone else and affiant is informed that said agents took samples of the contents of said containers.

7. That on said day the said officers of the United States entered said premises and made said search without any search-warrant and without any right or authority whatsoever and said search was conducted and made by said officers and each and all of them, without affiant's consent, [13] against his will, and in violation of his Constitutional rights, and without the consent of any person having the right to so consent for affiant; that said search and seizure was conducted and made by said federal officers and each and all of them, without a search-warrant issued from any court of competent jurisdiction, or otherwise; that no search-warrant or copy thereof was exhibited to affiant or read to him, nor was any search-warrant or copy thereof exhibited to affiant's said employees, or read to them; that none of said federal officers delivered a receipt for the property taken or claimed to have been taken and found by said officers, specifying it in detail, to affiant, or to affiant's employees, neither did either or any of said officers leave a copy of any search-warrant together with a receipt for the property claimed to have been found and taken by said officers and place where said officers claim to have found said property. That this affiant was not placed under arrest by either or any of said officers at said time, and not until the 19th day of April, 1928, subsequent to said search and seizure.

8. A copy of said survey made by the county surveyor of Carbon County, Montana, is hereto attached and made a part hereof.

9. That said search and seizure so made by said Federal Prohibition Officers were made and done without my authority and consent, and without the authority of any person having the right to concent for me, and were made forcibly and unlawful, and against my will, and in violation of my constitutional rights, and particularly in violation of the Fourth Amendment to the Constitution of the United States, and Section 25, Title 2 of the National Prohibition Act, Chapter 85, 41 Stat. 305.

10. That I am informed and therefore allege and state that the United States District Attorney, and his assistants and prosecuting officers, propose to use said property obtained by said search and seizures aforesaid, at the trial of the above-entitled action and to offer the same in evidence, and to offer testimony concerning what the officers, and each of them, claimed to have found in and upon said premises above described, and that by reason thereof, and of the facts above set forth, my rights under the Constitution [14] of the United States, and the Constitution of the State of Montana have been and will be violated unless the Court suppresses the introduction of said liquors as evidence, and all testimony concerning said search and seizure, and does not permit said officers to testify concerning anything they found or saw in connection with said search and seizure.

11. That this affidavit is made for the purpose

of having the Court make an order suppressing the introduction of said liquor above described, and the containers, in evidence, and not permit said officers to testify to any act or thing found, had or discovered at the time of said search; and for such other and further order as to the Court may seem just and proper.

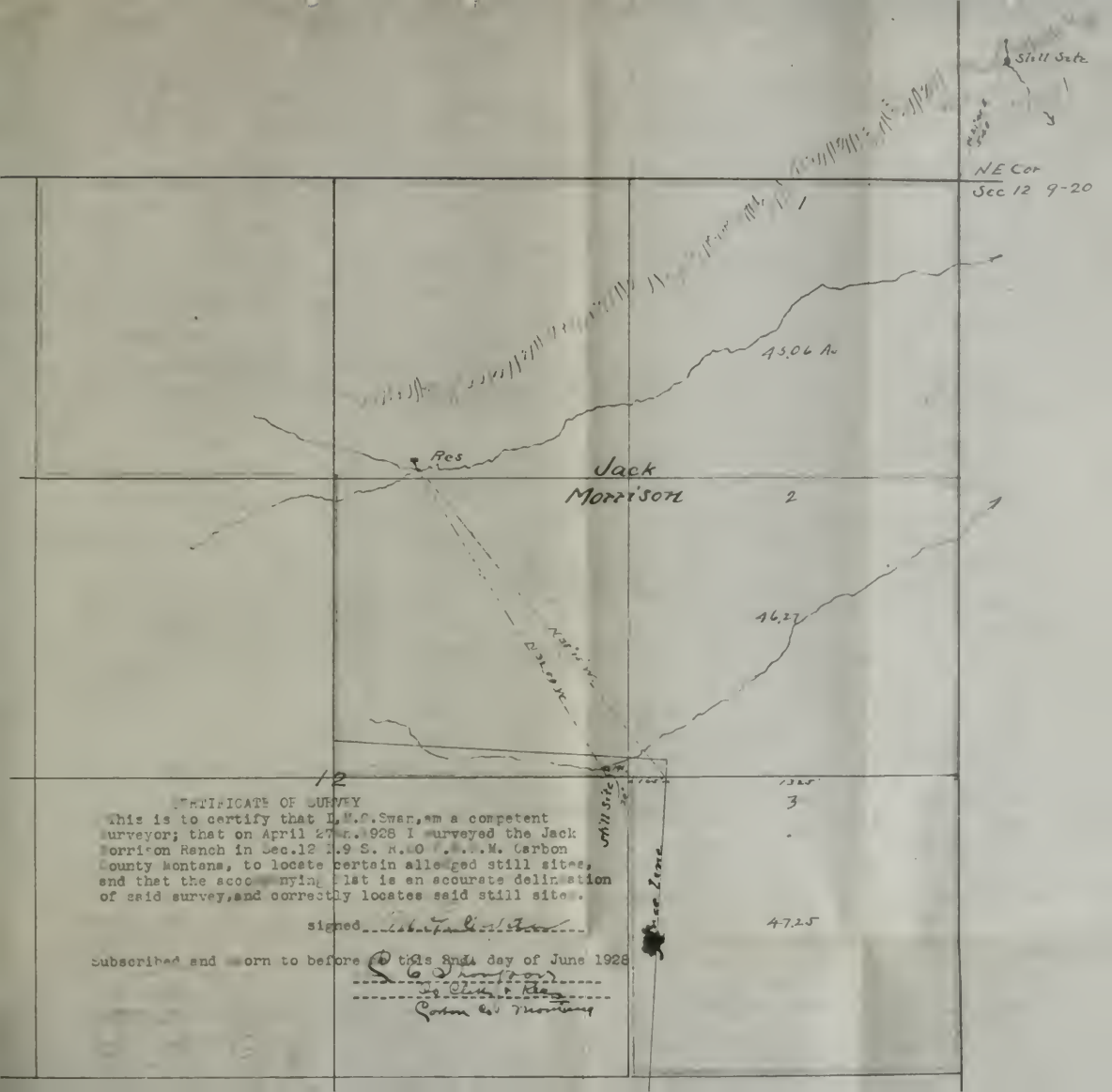
JACK MORRISON.

Subscribed and sworn to before me this 4th day of June, A. D. 1928.

JOHN G. SKINNER,

Notary Public for the State of Montana, Residing at Red Lodge.

My commission expires May 12th, 1929. [15]



CERTIFICATE OF SURVEY

This is to certify that I, W.C. Swan, am a competent surveyor; that on April 27th. 1928 I surveyed the Jack Morrison Ranch in Sec. 12 T. 9 S. R. 20 E. M.M. Carbon County Montana, to locate certain alleged still sites, and that the accompanying plat is an accurate delineation of said survey, and correctly locates said still sites.

signed _____

Subscribed and sworn to before me this 2nd day of June 1928.

_____

_____

Notary Public

AFFIDAVIT OF MAILING.

State of Montana,
County of Carbon,—ss.

Dagmar Matson, being first duly sworn, deposes and says on oath: That she is over the age of twenty years and a resident of Red Lodge, Carbon County, Montana; that she did, on the 7th day of June, 1928, duly serve a true and correct copy of the attached motion to suppress evidence upon Hon. William D. Rankin, United States District Attorney for the District of Montana, and attorney for the plaintiff named in the above-entitled action, by enclosing same in a stamped envelope addressed to Hon. Wellington D. Rankin, U. S. District Attorney, Helena, Montana, with postage fully prepaid on said envelope, and depositing same in the postoffice at Red Lodge, Montana. Affiant is informed and therefore states that the postoffice address of the said Wellington D. Rankin is as above set forth and that there is direct communication by mail between the city of Red Lodge, Montana, and the city of Helena, Montana.

DAGMAR MATSON.

Subscribed and sworn to before me this 7th day of June, A. D. 1928.

[Seal] JOHN G. SKINNER,
Notary Public for the State of Montana, Residing at Red Lodge, Montana.

My commission expires May 12, 1929.

Filed June 9, 1928. [17]

THEREAFTER, on July 10, 1928, the motion of defendant Morrison to suppress the evidence herein was duly heard and submitted, the record thereof being in the words and figures following, to wit:

(Title of Court and Cause.)

MOTION TO SUPPRESS EVIDENCE.

This cause came on regularly for hearing this day on motion of defendant Morrison to suppress the evidence herein, L. V. Ketter, Asst. U. S. Attorney, appearing for the United States and John G. Skinner, Esq., appearing for defendant Morrison. Thereupon M. G. Swan was sworn and testified for defendant, and a certain blue-print map and an affidavit of Morrison introduced, whereupon defendant rested. Thereupon B. A. Myers and F. P. Collins were sworn and examined as witnesses for the United States, whereupon the evidence closed and the cause was submitted to the Court and taken under advisement.

Entered in open court July 10, 1928.

C. R. GARLOW,
Clerk. [18]

THEREAFTER, on July 11, 1928, an order denying motion to suppress the evidence was duly entered herein, in the words and figures following to wit:

(Title of Court and Cause.)

ORDER DENYING MOTION TO SUPPRESS EVIDENCE.

This cause, heretofore heard and submitted to the Court on motion of defendant Morrison, to suppress the evidence herein, came on regularly at this time for decision, whereupon, after due consideration, Court ordered that said motion to suppress be and is denied.

Entered in open court July 11, 1928.

C. R. GARLOW,
Clerk. [19]

THEREAFTER, on July 12, 1928, said cause came on regularly for the arraignment, plea and trial of said defendants, the journal record thereof being in the words and figures following, to wit:

(Title of Court and Cause.)

TRIAL.

Defendants were duly called for arraignment, plea and trial this day, said defendants being present with their attorney, John G. Skinner, Esq., and L. V. Ketter, Esq., Assistant U. S. Attorney, appearing for the United States. Thereupon the defendants waived the reading of the information and each defendant entered a plea of not guilty.

Thereupon the following persons were duly impanelled, accepted and sworn as a jury to try the cause, viz.: Henry Stahl, A. E. Scanlan, C. P. Shaffer, H. W. Phillips, R. F. Reynolds, Fred Quinn, R. H. Sanderson, John Applegate, William Sanders, Basile Perry, W. C. Renwick, and D. E. Robertson.

Thereupon J. H. Denny was sworn as a witness for the United States, whereupon Mr. Skinner renewed his motion to suppress the evidence herein in accordance with the motion on file in this case. Thereupon Court ordered that the motion be denied and exception of defendant noted. Thereupon J. H. Denny testified as a witness for the United States, and B. A. Myers and F. P. Collins were sworn and examined as witnesses for the United States, and two pint bottles containing liquor and a certain blue-print map, introduced in evidence, whereupon the United States rested.

Thereupon Mr. Skinner, in behalf of defendants Doran and Graves moved the Court to direct the

jury to return a verdict of not guilty as to them, for lack of proof, which motion was denied at this time with leave to renew at the close of the testimony.

Thereupon M. G. Swan, Harold Graves, George Doran, Jr., and Mrs. George Doran, Jr., were sworn and examined as witnesses for defendants, whereupon defendants rested.

Thereupon the defendants Doran and Graves renewed their motion for a directed verdict, which motion was by the Court denied. Thereupon, after the arguments of counsel and the instructions of the court, the jury retired to consider of its verdict, the bailiffs being sworn in this case and for all cases given into their custody at this term.

Thereafter, at 5 P. M., Court ordered that the jury seal its verdict, if agreed upon, and return the same into court at 10 A. M. to-morrow.

Entered in open court July 12, 1928.

C. R. GARLOW,
Clerk. [20]

THEREAFTER, on July 13, 1928, the verdict of the jury was duly rendered and entered herein, as follows, to wit:

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, find the defendant George Doran, Jr., guilty in manner and

form as charged in the information on file herein as to counts 3 and 4 and not guilty as to counts 1 and 2; and find the defendant Harold Graves guilty in manner and form as charged in the information on file herein as to counts 3 and 4, and not guilty as to counts 1 and 2; and find the defendant J. D. (Jack) Morrison guilty in manner and form as charged in the information on file herein as to counts 1, 2, 3 and 4.

H. W. PHILLIPS,
Foreman.

Filed July 13, 1928. [21]

THEREAFTER, on July 14, 1928, Court rendered its judgment against defendants Doran and Graves as follows, to wit: [22]

District Court of the United States, District of Montana.

No. 1062.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE DORAN, Jr., and HAROLD GRAVES,
Defendants.

JUDGMENT (GEORGE DORAN, JR., AND HAROLD GRAVES).

The United States Attorney with the defendants and their counsel present in court.

The defendants were duly informed by the Court of the nature of the charge against them as appears in the information herein, and of their arraignment, and pleas of not guilty, and of their trial and the verdict of the jury of guilty as charged in counts three and four of said information.

And each defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendants having been duly convicted in this court of the offense of unlawfully possessing intoxicating liquor and maintaining a common nuisance, in violation of the National Prohibition Act, committed on the 18th day of April, 1928, in Carbon County, in the State and District of Montana, as charged in counts three and four of the information herein;

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that for said offense you, the said George Doran, Jr., and Harold Graves, and each of you, be confined and imprisoned in the county jail at Billings, Montana, for the term of One Month.

Thereupon, on motion of defendants, Court ordered that the commitments herein be stayed for a period of three days.

Judgment rendered and entered July 14th, 1928.

C. R. GARLOW,
Clerk.
By H. H. Walker,
Deputy. [23]

THEREAFTER, on July 14, 1928, Court rendered its judgment against defendant Morrison as follows, to wit: [24]

District Court of the United States, District of Montana.

No. 1062.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. D. MORRISON,
Defendant.

JUDGMENT (J. D. MORRISON).

The United States Attorney with the defendant and his counsel present in court.

The defendant was thereupon duly informed by the Court of the nature of the charge against him as appears in the information herein, and of his arraignment, and plea of not guilty, and of his trial and the verdict of the jury of guilty as charged.

And the defendant was then asked if he had any

legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of unlawfully manufacturing and possessing intoxicating liquor, possessing property designed for the manufacture thereof, and maintaining a common nuisance, in violation of the National Prohibition Act, committed on the 18th day of April, 1928, in Carbon County, in the State and District of Montana as charged in the information herein;

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that for said offense you, the said J. D. Morrison, be confined and imprisoned in the county jail at Billings, Montana, for the term of Two Months, and that you pay a fine of Three Hundred Dollars, and that you be confined in said county jail until said fine is paid or you are otherwise discharged according to law.

Thereupon, on defendant's motion, he was granted a stay of commitment for a period of three days.

Judgment rendered and entered July 14th, 1928.

C. R. GARLOW,
Clerk.
By H. H. Walker,
Deputy. [25]

THEREAFTER, on October, 13, 1928, notice of appeal was duly filed herein as follows, to wit:

(Title of Court and Cause.)

NOTICE OF APPEAL.

To the UNITED STATES, Appellee, and WELLINGTON D. RANKIN, Esq., United States Attorney, Attorney for Said Appellee:

You and each of you will please take notice that defendants in above-entitled cause hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled cause on July 14th, 1928, and that the certified transcript of record will be filed in the said Appellate Court within thirty days from the filing of this notice.

JOHN G. SKINNER,
Attorney for Defendants.

Due service and receipt of a copy hereof is admitted this 13th day of October, A. D. 1928.

L. V. KETTER,
Assistant United States District Attorney.

Filed October 13, 1928. [26]

THEREAFTER, on October 13th, 1928, an assignment of errors was duly filed herein, in the words and figures following, to wit: [27]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Now come the defendants above named and make and file this assignment of errors:

1. The trial Judge erred in deciding that the search of defendants' premises and farm was legal.

2. The said Court erred in overruling defendants' written motion to suppress the evidence herein made and filed prior to the trial of said cause.

3. The said Court erred in overruling defendants' oral motion to suppress the evidence, same made at the conclusion of the Government's case.

4. The said Court erred in refusing to grant the motion immediately at the close of the plaintiff's case.

5. The said Court erred in denying defendants' motion immediately at the close of the trial.

6. There was no evidence lawfully obtained to sustain the verdict herein.

7. There is not sufficient or any evidence upon which the verdict of the jury should be allowed to stand.

8. The verdict is against the law.

9. The verdict is against the evidence.

10. The said Court erred in giving and rendering judgment against said defendants on such verdict. [28]

WHEREFORE, these defendants pray that said judgment and order of said Court may be reversed.

JOHN G. SKINNER,
Attorney for Defendants, Red Lodge, Montana.

Service of the foregoing admitted and copy received this 13th day of October, A. D. 1928.

L. V. KETTER,
Asst. United States Attorney.

Filed Oct. 13, 1928. [29]

THEREAFTER, on October 15th, 1928, petition for appeal and order allowing same were duly filed and entered herein, as follows, to wit: [30]

(Title of Court and Cause.)

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

Now come the above-named defendants and petition this Court for an appeal herein, and respectfully say:

1. That an information was filed against said defendants in the above-entitled court, charging said defendants jointly with having violated the National Prohibition Act, particularly the manufacture of intoxicating liquor, possession of property designed for that purpose, possession of intoxicating liquor, and the maintenance of a nuisance. That before the trial of this action, the defendants filed herein their motion to suppress the evidence obtained by the officers of the Government

in the search and seizure of the property of said defendants on April 18, 1928, without a warrant. This motion was overruled by the Court, and on the 12th day of July, 1928, defendants were tried upon said information by jury. The jury found one of the defendants guilty upon all of the counts of the information and two of the defendants not guilty upon certain counts. On the 14th day of July, 1928, the above-entitled court gave, made and rendered its judgment against the defendants and ordered that the defendants, George Doran, Jr., and Harold Graves, be confined to the county jail of Yellowstone County for a period of forty-five days each, and that the defendant, Jack Morrison, be confined to the county jail of Yellowstone County for the period of sixty days and that he pay a fine of $300.00. [31]

2. That the defendants, conceiving themselves aggrieved by said judgment, and the proceedings had prior thereto in this case, allege that certain errors were committed therein to their prejudice.

3. That the defendants believe the aforesaid decisions and orders of the Court contrary to law and contrary to their rights under the Constitution of the United States; all of which more fully appears in detail in the assignment of errors filed herein.

WHEREFORE, your petitioners respectfully pray that their appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of said errors so complained of; that a transcript of the record, proceedings and papers upon which the judgment was rendered may

be sent to said Circuit Court of Appeals; that such appeal shall operate as a stay of proceedings under said judgment on the defendants' furnishing a bond in such amount as the Court may direct for such purpose according to law, to the end that said cause may be reviewed and determined and that said judgment and every part thereof be reversed, set aside and ordered held for naught, and for such other and further relief or remedy in the premises as the Court may deem appropriate.

Dated this 11th day of October, 1928.

JOHN G. SKINNER,
Attorney for Petitioners.

Service of the foregoing admitted this 13th day of October, A. D. 1928.

L. V. KETTER,
Asst. United States Attorney.

ORDER.

IT IS ORDERED that the appeal of said defendants be allowed and issued as above prayed for upon said defendants' executing bonds according to law, the said defendant, George Doran, Jr., is required to execute a bond in the sum of Five Hundred [32] Dollars; the said defendant, Harold Graves, is required to execute a bond in the sum of Five Hundred Dollars; and the said defendant, J. D. (Jack) Morrison, is required to execute a bond in the sum of Five Hundred Dollars; and that upon due execution, approval and filing of said bonds, the same shall act as a supersedeas herein.

Dated this 15th day of October, A. D. 1928.

CHARLES N. PRAY,
Judge.

Filed Oct. 15, 1928. [33]

THEREAFTER, on October 15th, 1928, an order fixing bonds on appeal was duly entered herein, as follows, to wit:

(Title of Court and Cause.)

ORDER FIXING AMOUNT OF BONDS.

It appearing that the defendants have this day filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled cause on July 14, 1928,

It is ordered that the amount of cost bond on said appeal herein be and hereby is fixed in the sum of Two Hundred and Fifty Dollars ($250.00), conditioned as required by law and rule of this court;

And it is ordered that upon the giving by said defendant, George Doran, Jr., of a good and sufficient bond or undertaking in the sum of Five Hundred Dollars ($500.00), and the giving by said defendant, Harold Graves of a good and sufficient bond or undertaking in the sum of Five Hundred Dollars ($500.00), and the giving by said defendant, Jack (J. D.) Morrison of a good and sufficient bond or undertaking in the sum of Five Hundred

Dollars ($500.00) and conditioned as required by law and rule of this court, all further proceedings in this court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals, or by the Supreme Court of the United States upon a petition for writ of certiorari.

Dated this 15th day of October, A. D. 1928.

CHARLES N. PRAY,
United States District Judge.

Filed October 15th, 1928. [34]

THEREAFTER, on October 15th, 1928, the bill of exceptions was duly signed, settled and allowed, and filed herein, being in the words and figures following, to wit: [35]

(Title of Court and Cause.)

BILL OF EXCEPTIONS OF DEFENDANTS.

BE IT REMEMBERED that the defendants duly filed and served their motion to suppress the testimony and any evidence found by reason of the search of the premises of the defendant, Jack Morrison, made by the Federal Prohibition Agents on the 18th day of April, 1928, which said motion was in writing and supported by affidavits (here the Clerk of the above-entitled court will insert a true copy of the motion, notice of motion, and affidavits filed herein by the defendants to suppress the testimony and all evidence concerning the search and

seizure made by Federal Prohibition Agents on April 18th, 1928, with the endorsements thereon and the filing date in his office). Said motion was duly submitted to the trial court and said motion was denied, and the order of said Court was duly excepted to by said defendants, which said exception was denied by said Court.

Thereafter, this cause came on for trial on July 12th, 1928, at Billings, Montana, before Hon. Frank H. Rudkin, Judge presiding, sitting with a jury. L. V. Ketter, Esq., appeared as counsel for the Government. The defendants appeared in person and by their counsel, John G. Skinner, of Red Lodge, Montana.

A jury of twelve men having been duly and regularly impaneled and sworn to try the issues, the following proceedings were had.

(Opening statement by Mr. Ketter.) [36]

TESTIMONY OF J. H. DENNY, FOR THE GOVERNMENT.

J. H. DENNY, a witness called on behalf of the Government, being first duly sworn, upon direct examination by Mr. KETTER, testified as follows:

Mr. SKINNER.—Now, if your Honor please, at this time, in view of the fact that there was no testimony taken at the time of the motion to suppress, and since we have a reporter here now to make a record, I would like to ask the Court to renew my motion to suppress the testimony in connection with the original motion on file in the Clerk's office. We have a reporter here now to make a record.

(Testimony of J. H. Denny.)

The COURT.—The motion is denied.

Mr. SKINNER.—To which we except.

Q. State your name. A. J. H. Denny.

Q. What official position, if any, do you hold?

A. Federal Prohibition Agent.

Q. For what district? A. The 18th.

Q. And where do you operate; where is your field? A. Wyoming, Colorado and New Mexico.

Q. Were you such officer on the 18th day of April, 1928? A. Yes, sir.

Q. I will ask you if on that date you were at the place known as the Jack Morrison place, on Gold Creek, in Carbon County? A. Yes, sir.

Q. And who was with you?

A. Agent Myers, Collins, and Wyoming State Enforcement Officer S. R. Owens. [37]

Q. What kind of a place is this, first?

A. Well, it is an ordinary dry farm.

Q. Is it a ranch, farm? A. Yes, sir.

Q. And who did you find there when you three men went up to the place?

A. These two men, Graves and Doran and a lady.

Q. And did you make an investigation around there? A. Yes, sir.

Q. You may state what you did?

A. When we drove up to the place, Agent Collins and I went to the door and asked if Mr. Morrison was at home, and I was told he was at Billings. I told them who I was—who we were—and that I would like to—I understood that they were operating a still there, and that I would like to look

(Testimony of J. H. Denny.)

around. I was told to go ahead, so we searched the place.

Q. Well, what did you find? A. We found—

Mr. SKINNER.—Now, if your Honor please, may we have an understanding that this testimony goes in under my objection to the testimony concerning the search as incompetent, irrelevant and immaterial.

The COURT.—Yes, your objection only went to a part of the search the other day. You raised no objection to the search so far as the still was concerned.

Mr. SKINNER.—Just on the premises only.

A. We found two 50-gallon barrels of whisky at the corner of the chicken-house.

Q. Full of whisky? [38] A. Yes, sir.

Q. What kind? Moonshine?

A. Yes, sir. They were buried at the corner of the chicken-house.

The COURT.—Proceed.

A. There were three 50-gallon barrels buried in the blacksmith-shop, that had contained whiskey, two vats out in the yard, in front of the blacksmith-shop that had just been constructed, that were similar to the vats found in the two still houses, and we followed the tracks of a pair of mules and a two-wheeled cart from the house, I judge three-quarters of a mile southeast, and we found a still-house that had just been completed. It contained a number of mash vats, pressure-tank, burner, and then we followed this same pair of

(Testimony of J. H. Denny.)

mules and the two-wheeled cart east for a little, over a half mile, and we found a still-house, with a number of mash vats, and, as I remember, about seven hundred gallons of mash, a steam boiler, pressure-tank, burners, three copper stills, and they were cached about fifty yards away in the sage-brush from the still-house.

Q. Now, is this country rough country where this ranch is located?

A. Yes, sir. The ranch itself sits on a little basin.

Q. Do you know how large a ranch that is?

A. It contains 160 acres, as I remember. We was there in 1927, and I looked it up at Red Lodge.

Q. You were there before at this ranch and knew that Morrison had been living there during that time? A. Yes, sir.

Q. Now, you stated something about some tracks —do I understand you to say that there was a trail leading from the buildings on this ranch to these two still-houses that you mentioned?

A. Yes, sir, led right out of the front yard.

Q. And you could see what you took to be mule tracks in this trail?

A. Did not take them to be mule tracks; I knew they were mule tracks. [39]

Q. You could see these mule tracks leading down this trail to those two still-houses? A. Yes, sir.

Q. And also did you say there was a narrow-tired track in this trail? A. Yes, sir.

(Testimony of J. H. Denny.)

Q. Now, did you look around to see if there were any mules there at that place?

A. The mules were in the barn, with a harness on, and the cart was in the yard, two-wheeled cart.

Q. Now, what part of this ranch was under cultivation?

A. Wasn't any of it under cultivation.

Q. Did you see any plowing that had been done there? A. No, sir.

Q. Well, was there—will you tell me whether a tractor had been used around there?

A. Yes, sir, they had used a tractor to scrape out the new still-house.

Q. How could you tell that?

A. From the tractor tracks.

Q. That is, were there prints of lugs there, where they had run out? A. Yes, sir.

Q. In dragging this out? A. Yes, sir.

Q. Did you find a tractor at this place?

A. No, sir.

Q. Did you observe whether or not it had lugs on it?

A. Yes, sir. They had used this tractor—I believe the tractor had a road drag attached to it at that time.

Q. Did it have lugs on there such as, in your opinion, would make the kind of tracks that you saw up there where they had scraped it at the still-house? [40] A. Yes, sir.

Q. Now, when you were finding this stuff there, at the house, as I understand it, you found two

(Testimony of J. H. Denny.)

50-gallon barrels of moonshine buried there around the buildings some place?

A. Yes, sir, they were buried—

Q. Now, was Doran and Graves there at that time? A. Yes, sir.

Q. Did they made any statements of any kind there at that time about this whiskey?

A. Yes, sir, they disclaimed any knowledge of it.

Mr. SKINNER.—I did not get that answer.

A. They disclaimed any knowledge of the whiskey.

Q. What did you do with the stills?

A. We chopped them up.

Q. And the other paraphernalia?

A. Yes, sir.

Q. Did you save any of the whiskey?

A. We saved a pint from each barrel.

Q. And put it in bottles? A. Yes, sir.

Q. I will ask you to look at these, and ask you to state whether or not those are the bottles that you put it in? A. Yes, sir.

Q. Is that your signature thereon, Mr. Denny?

A. Yes, sir.

Mr. KETTER.—We offer these in evidence.

Mr. SKINNER.—Objected to on the ground no proper foundation laid for the proof, and on the further ground that the evidence now discloses that the search was made without a warrant.

The COURT.—What is the first ground of your objection. [41]

(Testimony of J. H. Denny.)

Mr. SKINNER.—No proper foundation for the testimony.

The COURT.—What do the bottles contain?

A. Whiskey.

The COURT.—You tasted it and know that?

A. Yes, sir.

The COURT.—Objection overruled.

Exception.

Cross-examination of J. H. DENNY by Mr. SKINNER.

Q. Mr. Denny, you say you are assigned to Colorado and New Mexico?

A. And Wyoming, yes, sir.

Q. And Wyoming? A. Yes, sir.

Q. Your headquarters are where?

A. Cheyenne.

Q. The ranch of the defendant Jack Morrison is situated in Montana? A. Yes, sir.

Q. And you met Mr. Collins and Mr. Myers at the ranch, or at Cody, or where? A. Cody.

Q. You say this ranch is a dry land ranch?

A. It has a spring on it, yes, sir.

Q. And no evidence of any cultivation at all?

A. Well, it has been plowed.

Q. It has been plowed?

A. I judge 10 acres have been plowed at some time or other.

A. You went all over the ranch, did you, Mr. Denny? I say, you went over the ranch; you

(Testimony of J. H. Denny.)

could see most of it from the house, couldn't you anyway? A. Yes, sir. [42]

Q. There was no crop of any kind at the time you were there? A. No, sir.

Q. No evidence of any crop? A. No, sir.

Q. I take it you went in by the main road, right there by the red gate, drove up the main road to the ranch? A. Yes, sir.

Q. There is a well-traveled road there, isn't there?

A. Yes, sir.

Q. And that road extends out to the main road that runs from the ranch to the Clark Fork River?

A. Yes, sir.

Q. As a matter of fact, there are several roads right in that vicinity of that ranch that have been used by sheep men and timber men and other purposes, aren't there?

A. There is a number of roads there.

Q. There is a road from Red Lodge to Cody, the old trail, that goes right past the ranch; you know that road, don't you?—not right past the ranch, but a very short distance from the ranch—or didn't you see that road?

A. Yes, we came out of there in 1927, on that road.

Q. Which way did you come on this trip; did you come out on the Clark's Fork?

A. No, sir, I came out of Cody to Chance, Montana.

Q. You saw the buildings on the place?

A. Yes, sir.

(Testimony of J. H. Denny.)

Q. You noticed the house there as being a good, fair farm house, didn't you? A. Yes, sir.

Q. Did you go inside of the house?

A. Yes, sir. I was in and talked to Mr. Graves.

Q. When you talked to Mr. Graves, he was right in the kitchen I [43] suppose? A. Yes, sir.

Q. When you went there to the door?

A. Yes, sir.

Q. And you told him you were Federal Officers?

A. Yes, sir.

Q. And you told him you were going to search the ranch, didn't you? A. Yes.

Q. Did you say anything about having a warrant, or not having one? A. No, sir.

Q. Had you discovered any stills at that time?

A. No, sir.

Q. You asked first for Mr. Morrison?

A. Yes, sir.

Q. You knew it was Mr. Morrison's ranch, didn't you? A. Yes, sir.

Q. The same defendant here, Jack Morrison?

A. Yes, sir.

Q. They told you he was at Billings?

A. Yes, sir.

Q. And then you told them you wanted to search the ranch? A. Yes, sir.

Q. They did not make any objection?

A. Yes, sir.

Q. They did not tell you to go ahead and search, did they? A. Yes, sir.

Q. Who said that? A. I believe Mr. Doran.

(Testimony of J. H. Denny.)

Q. Do you recognize the defendants here?

A. Yes, sir.

Q. Pick out the boy that told you to go ahead and search the ranch? A. The smaller one. [44]

Q. That is Mr. Graves? A. He is the one.

Q. There was a lady right there in the house at the time, wasn't there? A. Yes, sir.

Q. She heard what went on? A. Yes, sir.

Q. Now, the stills you have described were outside the fence line, weren't they? A. Yes, sir.

Q. I don't suppose you have a map of it yourself?

A. No, sir.

Q. Calling your attention to defendant's proposed Exhibit 1; this is the top of the map, north?

A. Yes, sir, they are correctly located, as I remember it.

Q. You say that the stills there are correctly located? A. Yes, sir.

Q. Now, this is the north portion of the map, where it says Defendants' Exhibit 1, where it says "Spring and still sight," at the northeast corner of Section 12, that is all some distance, is it not, from the fence corner? A. Yes, sir.

Q. The surveyor says 540 feet; it is at least that, you would think? A. Yes, sir.

Q. And that still site is situated in a draw or coulee, a wet coulee? A. Yes, sir.

Q. There is some trees there, or willows?

A. Brush.

Q. Oh, brush; call it brush and willows?

(Testimony of J. H. Denny.)

A. Yes, sir.

Q. And that is up on a sidehill? A. Yes, sir.

Q. It is quite a steep grade up there, isn't it?

[45] A. Yes, sir, it is.

Q. And the line shown here, where it starts at the residence with a dotted line, is a road; you can recall the road along there? A. Yes, sir.

Q. And that still is probably six or seven hundred feet or better from the main road, isn't it?

A. Yes, sir.

Q. It is a main road; there is no question about that? A. It is a main road into the ranch.

Q. And connects up with the county roads—there is no fences to open from there to any place you want to go? A. No, sir.

Q. Now, there is another still site, is there not, that was situated in a coulee, or do you call it a coulee or draw? A. Well, a depression.

Q. A draw of ten or fifteen feet—something like that? A. Well, a wet place.

Q. Some of the draw had been washed out with waters, hadn't it?

A. Yes, sir, and scraped out and squared up.

Q. Sure, and put a roof on it? A. Yes, sir.

Q. And that is across a forty, practically, isn't it, from the house, isn't it? A. Yes, sir.

Q. And that is outside the fence line; no doubt about that? A. Yes, sir.

Q. And you say that there is a road that runs from the house down to this still site?

(Testimony of J. H. Denny.)

A. Yes, sir.

Q. But that road also extends across up into the field, doesn't it, or didn't you notice that?

A. Yes. [46]

Q. Clear across the field.

A. Yes, goes out on the other side.

Q. Sort of farm road or sheep wagon road—whatever they want to call it—it isn't the main road, traveled road?

A. Well, there wasn't any tracks any farther than the still-house.

Q. You found tracks, as I understand your testimony, leading from the barn to the still-house—a wagon track or two-wheeled track, and mule tracks?

A. Yes, sir.

Q. Well, was it a well-traveled road—just describe it?

A. Well, this mule team had been over there four or five times in the last two or three days.

Q. How could you tell that—two or three days?

A. The age of the tracks.

Q. Can you tell the age of a track by looking at it? A. Close, yes.

Q. And had it rained over in that country at all; when, do you know? A. No, I don't.

Q. You don't know if those tracks had been there three days, or five days, or a week, do you?

A. Yes, sir; I do.

Q. You know that, do you?

A. Yes, sir; I know it.

(Testimony of J. H. Denny.)

Q. You have had experience in seeing tracks of mules and horses so you can tell the age of them?

A. Yes, sir.

Q. How long have you been doing that?

A. About thirty years, I think it is.

Q. How old are you? A. Thirty-five.

Q. Been tracking since you were five?

A. Yes, sir.

Q. As I understand, you didn't find these still sites until after you [47] had found the liquor?

A. Yes, sir; we found the still sites before we found the liquor.

Q. Oh, you found the still sites before going into the house?

A. Yes, sir; we found the still sites before we found the liquor.

Q. And this liquor was buried? A. Yes, sir.

Q. In the ground? A. Yes, sir.

Q. One was buried right up near the chicken-house? A. Yes, sir.

Q. About how far from the house was it?

A. The first barrel was, I judge, ten feet from the southeast corner, both together there.

Q. The barrels were right there together, weren't they? A. Yes, sir.

Q. You just dug the barrels up and left them there?

A. We took a pint out of each barrel and broke them up and left them there.

Q. These two bottles came out of the barrels?

A. One bottle came out of each barrel, yes, sir.

(Testimony of J. H. Denny.)

Q. Any other samples taken? A. No, sir.

Q. Then you found some whiskey barrels in the place where they kept the car, or barn?

A. It looked like a blacksmith-shop; it must have been used for that.

Q. And they were buried? A. Yes, sir.

Q. How did you find them? A. A rod.

Q. That is, you had an iron road? A. Yes, sir.

Q. You took that road and jabbed it into the ground around there? A. Yes, sir. [48]

Q. And in that way discovered them?

A. Yes, sir.

Q. And we had a hearing here just two days ago on a motion. Mr. Myers said that there was a pipe-line running from the residence to the still site, situated on what we would call a coulee, immediately south of the still-house. Was there a two-inch pipe-line running from the still-house, or water line?

Mr. KETTER.—That is objected to as incompetent, irrelevant and immaterial, at this time, trying to impeach something that is not in the case.

Mr. SKINNER.—I am not impeaching anything; I am just asking him to describe the condition there.

The COURT.—You referred to the testimony of the other witness, however. I will sustain the objection, so far as referring to any witness. You can ask about the facts.

Q. All right. Tell us, was there a pipe-line running from the still house, that is situated in Section

(Testimony of J. H. Denny.)

12—I can't see that—well, it is this lower still site, off from the main road.

A. The pipe-line ran across this little stream and emptied into an open ditch and across here, and there was only one joint in the pipe-line; the pipe-line came from the spring right here, back past the house and across the ditch and emptied into the ditch.

Q. Ran clear across? A. Yes, sir.

Q. You followed it across?

A. Yes, sir; there was a pipe-line across there.

Q. You saw that carefully? A. Yes, sir. [49]

Q. Did you follow the pipe-line up to the house from the still?

A. Yes, sir. I followed it from there to the spring.

Q. And when you drove down to this still site, you drove down in cars, didn't you?

A. Yes, sir.

Q. Two cars? A. Just drove one car down.

Q. Who went down to the still site? A. First?

Q. Yes, first? A. Owens and I.

Q. Drove down in a car? A. Yes, sir.

Q. And what kind of a road was there?

A. We followed the road there.

Q. And what kind of car are you driving, an ordinary balloon-tired car? A. Yes, sir.

Q. And afterwards, did someone else go down there?

A. Mr. Myers and Mr. Collins both came down. They did not drive their car down.

(Testimony of J. H. Denny.)

Q. They walked down?

A. Yes, sir. They walked across from the house.

Q. Now, where was this road from the upper still; where would it connect with the county road; which side of the coulee?

A. The upper still, do you mean? This one?

Q. That is the upper still up there on the side-hill, up by the mountains?

The COURT.—The jury is not getting very much out of this private confab between you and the witness.

Mr. SKINNER.—I beg your Honor's pardon. [50] I will show it to the jury pretty soon, as soon as I lay a foundation for it.

A. The road came up about this way, and around about that direction (indicating).

Q. That would be on the east side of the coulee?

A. Yes, sir.

Mr. SKINNER.—I will offer this, if you have no objection to it. (Referring to Defendants' Exhibit 1.)

Mr. KETTER.—I have no objection to it.

Mr. SKINNER.—We will offer it in evidence. Then, the jury can look at it.

Q. When was the arrest made of the two boys, after you had done all this? A. Yes, sir.

Q. And they were brought to court and required to put up bonds, or didn't you have anything to do with that?

A. I did not have anything to do with that. I went back to Cody.

(Testimony of J. H. Denny.)

Q. There was no arrest made before the search at all? A. No, sir.

Q. And neither you nor any of the other officers had a search-warrant? A. No, sir.

Redirect Examination of J. H. DENNY by Mr. KETTER.

Q. These—were there any other houses around this ranch? A. No, sir.

Q. That is, no other persons were living right—or how far would you say this would be from the nearest house; that is, where somebody lived?

A. Three and one-half or four miles.

Q. Three and one-half or four miles? [51]

A. Yes, sir.

Q. Now, this road—what is this road; I didn't understand that myself (Referring to Exhibit 1)? Now, if you will, just look at this just a minute. This is north, as you understand? A. Yes, sir.

Q. And this would be east? A. Yes, sir.

Q. South and west? A. Yes, sir.

Q. And as you understand this map, the lines that are enclosed with blue pencil marks represent the Morrison ranch? A. Yes, sir.

Q. Is that it? A. Yes, sir.

Q. Now, here are some tracks or marks south of the place, called a still site, running across the quarter-section—40-acre tract there, called 45.06 acres, broken lines running down acros that 40 and the West 40, to a place called "Res," for residence; what do you understand that to represent?

(Testimony of J. H. Denny.)

A. I understand that to be the main road to the ranch.

Q. Main road to the ranch? A. Yes, sir.

Q. Well, does that road stop here at the ranch, or does it go on? A. Stops right at the ranch.

Q. Is there any road running past this ranch, or is this the main road itself, and goes up there and stops? A. Goes to the ranch and stops.

Q. It is not joined on to some other main road thtat runs to the ranch?

A. It goes on down and joins up with the main road.

Q. How far is that from the house?

A. Probably about three miles. [52]

Q. Are there any other houses along this road as you leave the main road down here and come up to this ranch road, that you remember of?

A. Well, it is farther than three miles to the main road. The road that we came in on, down here, I judge about a mile, a dim road, which at one time was the old road between Cody and Red Lodge; they don't use it any more.

Q. What I am getting at, this road apparently that is marked on here is just a road to the ranch.

A. Just a road to the ranch, yes, sir.

Q. All right, now up here is a place in the northeast corner of this map, there is a place called "Still site." Do you understand that that represents the approximate location where you found one of those stills that you have testified to?

A. That is where we found all three of them.

(Testimony of J. H. Denny.)

Q. Found all three of them?

A. Yes, sir. They were near the still house, right —they weren't in the still house itself; they were out in the sagebrush, about 50 feet from the still house.

Q. And what do you understand this word here, "Still site," down here just below the line marked "Fence," represents?

The COURT.—That is the first still house that they found—first still they found.

A. This is the first still site we found. There was not any still there.

Q. In other words, these represent the approximate locations of those two still houses?

A. Yes, sir.

Q. Now then, you testified that from the buildings here—from around the house and barn, there was a trail leading where, as shown on this map?

A. Leading from the residence right here, right down this road across [53] about there, and there was a small ditch right there, and there is a steep place there (indicating on plat). We did not drive our car up there.

Q. Well now, is that just a trail that has been worn there?

A. Worn by a pair of mules and two-wheeled cart.

Q. And now is that where you saw the two-wheeled cart tracks and the mule tracks?

A. Yes, sir.

Q. Did you see them leading from there up to where they stopped there? A. Yes, sir.

(Testimony of J. H. Denny.)

Q. They led up to that still-house—well, did they stop there?

A. Yes, sir; turned around and stopped.

Q. All right, now. How do you get down to this other still site?

A. You can walk across here, but we came out to the road and came around in this direction (indicating).

Q. Did you follow any trail getting there?

A. We followed the mule tracks and the two-wheeled cart tracks.

Q. And that road—you had to go through a line marked "Fence" here, just north of this still site, that is in the Southern part of the plat. Did you come through a fence, a gate, there?

A. We went through a wire gate into that still site.

Q. And you followed these same tracks down to that place? A. Yes, sir.

Q. And did the tracks stop there?

A. Yes, sir.

Q. Did the trail itself lead anywhere else except to this site? A. No, sir.

Q. In other words, the trail itself just led to the still site and stopped? A. Yes, sir.

Recross-examination of J. H. DENNY by Mr. SKINNER. [54]

Q. Just one more question—you say you went out east of the house and came out at the main road

(Testimony of J. H. Denny.)

nearly to the gate before you turned and went south to this still site?

A. We came back out here (indicating on plat) and through that gate right there. This gate right here was open. We came out around in this direction.

Q. Clear off from the place?

A. Yes, sir, came right down here.

Q. This still site you are pointing to now, the lower still site, the line goes right up the hill, don't it? In other words, this farm is in a basin with hills all around it, except from the east?

A. Yes, sir.

TESTIMONY OF B. A. MYERS, FOR THE GOVERNMENT.

B. A. MYERS, a witness called on behalf of the Government, being first duly sworn, upon direct examination by Mr. KETTER, testified as follows:

Q. State your name. A. B. A. Myers.

Q. What official position do you hold?

A. Federal Prohibition Agent.

Q. For Montana?

A. For Montana, for Utah and Wyoming and Montana.

Q. Did you go down to this place known as the Morrison place, in Carbon County? A. Yes, sir.

Q. On the 18th day of April, 1928?

A. 18th day of April, 1928.

Q. With Mr. Denny and Collins?

(Testimony of B. A. Myers.)

A. With Agents Denny and Collins and Wyoming State Agent Owens.

Q. And when you went up to this place, did you make any search there of any kind? [55]

A. We did.

Q. State what you found and where you found it?

A. We found 100 gallons of whiskey close to the farm buildings.

The COURT.—State everything you found, in the order in which you found it; it will be more intelligent to the jury.

A. The first thing we found was a still site that is south of the ranch. The next thing we found was a still site east and a little bit north of the ranch.

Q. Now, you spoke of still sites—were there stills there?

A. One the one east and north, there were three stills and seven hundred gallons of mash and several mash vats, and on the one south of the ranch, there were several empty mash vats, some that had been used and some that were new and had just been tarred and burned, and a pressure-tank, burned with kerosene, and some hose and things along that line, and the next thing that we found was 100 gallons of whiskey, that was found close to the farm buildings, and three empty 50-gallon barrels.

Q. Where did you find the whiskey at the farm buildings?

(Testimony of B. A. Myers.)

A. There was 100 gallons of whiskey found close to a chicken-house, buried in the ground.

Q. Did you find any other whiskey?

A. We found three empty gallon barrels, empty 50-gallon barrels, that were buried in the ground. They were buried—I was fixing a tire part of the time they found the barrels, so I can't tell you exactly. I know one or two were found near the garage or blacksmith-shop, in the garage or blacksmith-shop, and I think one was found just outside of that.

Q. Now, did you observe anything, any tracks, or anything at all there leading from the buildings on this Morrison ranch to these stills that you found? A. I did. [56]

Q. Tell the jury about that.

A. There was a span of mules—we found mule tracks leading from the buildings to both the still sites, where the stills was found, and one to where the burner and all was found, and in the barn was a span of mules, with a harness on, and their feet corresponded to the tracks that was found on the road, and a two-wheeled cart that had apparently been made out of the hind wheels of a spring-wagon, with narrow steel tires, that was found. In front of the farm was two new tanks, constructed along the same lines and made of the same kind of lumber as the tanks found at the two still-houses.

Q. What was found there; I did not get that?

A. Large tanks—two large tanks were in front of the barn and made of the same kind of lumber

(Testimony of B. A. Myers.)

and the same size as some of the tanks that was found at the still-house that contained the mash.

Q. Now, are there any other houses located close around this place here, that Morrison place?

A. There is not.

Q. These trails that you speak of, leading to the still-house, did they lead off of the road that leads into the ranch? A. Yes, sir.

Q. And went to the still-houses and there stopped? A. Yes, sir.

Q. And these mule tracks and wagon tracks that you speak of, or cart tracks, stopped there too?

A. Yes, sir.

Q. And the trails themselves stopped at these still sites?

A. The trails themselves stopped at the still sites.

Q. Did you notice any tractor marks around the place? A. I did.

Q. What was that?

A. I saw a Fordson tractor standing below the house a short distance, and I also saw where the tractor had been used on the road and [57] used where they had used it, or had used a tractor at the still-house that is designated as the one south of the ranch.

Q. What had been done down there by this tractor?

A. This building or cave had been constructed from the bottom of a dry wash. They had taken a dry wash and plowed and scraped it until they had made it approximately flat, 6½ or 7 feet deep,

(Testimony of B. A. Myers.)

and posts had been set and roof put over, and dirt and sagebrush put over the roof, so it looked just level with the country at a distance, and the work had been done with a tractor.

Q. Well, was that—did you see the tractor marks there? A. Yes, sir.

Q. Right under there where they had operated it?

A. Yes, sir.

Q. And what I mean by tractor marks is made by lugs that were on the tractor wheels. Is that what you mean?

A. Yes, there were lugs on the tractor itself and the tracks that we observed were made by a tractor that had lugs corresponding with the ones that were on the tracks there.

Q. And you say you destroyed the stills?

A. We did.

Q. And saved samples of the whiskey that you found in the two 50-gallon barrels?

A. Yes, sir.

Q. And I show you—I do not know as I had this marked. Will you mark this. (Exhibit referred to by Mr. Ketter marked Government Exhibits 2 and 3).

Mr. KETTER.—Now, for the purpose of getting it into the record, so it will be intelligently described, I re-offer Exhibits 2 and 3 in evidence.

Mr. SKINNER.—No objection, except my original objection. [58]

Q. Are those the two bottles of whiskey that you saved? A. Yes, sir.

(Testimony of B. A. Myers.)

Cross-examination of B. A. MYERS by Mr. SKINNER.

Q. Well, Mr. Myers, both still sites that you have described here are outside of the fence line on the Jack Morrison ranch, as you know it, aren't they?

A. They are outside of the fence; that is, around the house that is described as the Jack Morrison ranch.

Q. Well, there is a fence that runs around the whole ranch, isn't there, as you saw it there?

A. Yes, sir.

Q. Up this side and the west side and clear around to the northeast corner, except around the buildings?

A. I would say that the still-house is outside of the fence.

Q. And you would say that one is in a coulee, and the other one up on a steep sidehill?

A. In a draw, yes, sir.

Q. And if the engineer says it is four hundred fifty feet from the still site to the corner of that Morrison land, you would think it is correct?

A. Yes, sir.

Q. It is at least five or six hundred feet; there is no dispute about that at all? A. Yes, sir.

Q. And you testified that there was a water pipe extending from the still site to the residence yesterday?

A. I wanted to explain that to the Court. I did not examine both ends, but I stated in my testimony

(Testimony of B. A. Myers.)

that when Mr. Denny came on, he had seen it, and he would testify to it. I did not walk to the very head of it. When I got across from the residence, after the boys had notified me here and had walked part way, I cut across the place. As soon as you leave the house, the mountain begins, [59] and there is no field back of the house, just about room enough for the buildings on there, and right at the east of the house is a kind of coulee, there, that the water runs in, or a dry gulch like,—the main spring that I recall comes down west of the house.

Q. All right, it may be north or west of the house. They have got a two-inch pipe-line to the house, haven't they?

A. I should say that is west of the house.

Q. And you say you saw the boys working on that west of the house; but that has got nothing to do with the still, as far as you observed?

A. They evidently used that water to pipe into the house, while I could not testify to that.

Q. And they could not pipe that up to the north-east corner, could they—that would be impossible?

A. There is a ditch runs around that carried the water quite a little back. I made an examination and there is a small ditch about the size of that ditch that runs around the small piece of land that has been cultivated, but how that water connects with the pipe-line, I don't know, and that water is, I believe, piped to the house.

Q. You say you made a search for the whiskey that is right in the house yard there?

(Testimony of B. A. Myers.)

A. Yes, sir.

Q. And it is only a short distance from the house to the chicken-house—probably a block or less than a block? A. Forty or fifty yards.

Q. And the buildings are all right there in that—

A. In the basin where the farm buildings are built.

Q. And there is a fence around the yard too, isn't there?

A. There is a fence around what has been used as a garden. I would not say it encloses the house. [60]

Q. And as I understand it, you found the still sites and went up to the house, or went up to the house and then found the still sites?

A. When we went up to the house, I did not go in the house. I think Mr. Denny—

Q. You can tell us what you found first, can't you?

A. Yes, sir, the first thing that was found was the still sites south of the house.

Q. And before that, had you made any inquiries of the boys? A. Yes, sir.

Q. You drove up to the house and asked for Jack Morrison? A. No, sir; I did not.

Q. Someone asked for him? A. Yes, sir.

Q. And there was no whiskey at the still sites?

A. No, sir.

Q. And no still at the first site? A. No, sir.

Q. And the other one; that is, the one 540 feet

(Testimony of B. A. Myers.)

from the northeast corner of the Morrison land, there was three boilers, or something like that, and the stills farther up in the brush?

A. The coils and steam boiler, and approximately 700 gallons of mash, and several empty vats, were in the still-house. The three cookers—what you might call them, or stills—they were just around behind a clump of bushes and hid in the sagebrush.

Q. In other words, they were not set up and in operation. A. They were not.

Q. And George Doran was not out there at either still when you were there? A. No, sir.

Q. And neither was young Graves? [61]

A. No, sir.

Q. They were at the house? A. Yes, sir.

Q. It was noon when you got there, wasn't it?

A. Yes, sir.

Q. And Mr. Morrison was not there?

A. No, sir.

Q. There was some lady in the house?

A. She was the wife, I understand, of one of these boys.

Q. She was there on the place? A. Yes, sir.

TESTIMONY OF F. P. COLLINS, FOR THE GOVERNMENT.

F. P. COLLINS, a witness called on behalf of the Government, being first duly sworn, upon direct examination by Mr. KETTER, testified as follows:

Q. Your name is F. P. Collins, and you are a

(Testimony of F. P. Collins.)

Federal Prohibition Agent, are you not, Mr. Collins? A. Yes, sir.

Q. Were you down in what is known as the Morrison ranch, in Carbon County, with Agent Denny, Collins—that is, Agent Denny, Myers, and Owens, on the 18th day of April, 1928?

A. Yes, sir; I was.

Q. And you assisted there in making a search of that place? A. Yes, sir.

Q. You might state to the Court now what you found there and where, in its natural sequence of events?

A. We drove to that place about noon on that date. The others—this smaller man of the two there was in the house with some lady, apparently eating dinner. Agent Denny and myself went to the back door of the place and this young man came to the door. Denny told him who we were—and what we were there for, and he said there was not any such thing there, to his knowledge, but go [62] ahead. Immediately we — the information we had led us to believe.

Mr. SKINNER.—Just a minute now, your Honor, we object to that—

The COURT.—Yes, I will sustain the objection. State what was found.

A. We went ahead; the other boys went their way. We split up to look for those stills. We went over on the mountain to the northwest of the house, and finally, when I came back to the top of

(Testimony of F. P. Collins.)

the mountain, I heard a shot which I supposed was to attract my attention.

Q. Well, leaving out the details, state what you found as you went?

A. I went across to this place designated as south of the ranch, I believe, and there was twelve mash vats, some high-pressure burners, and high-pressure tanks, and some gasoline.

The COURT.—There seems to be no dispute about the presence of those two sites. It seems to be conceded that there were two sites there.

Q. Well, you have heard what has been testified here by the other two agents, about what was found, and where it was found. Is your testimony substantially the same as that?

A. Yes, substantially the same.

Cross-examination of F. P. COLLINS by Mr. SKINNER.

Q. Well, did you make the arrest of these boys?

A. I did.

Q. You did not arrest the woman? A. No, sir.

Q. Mr. Morrison was not there? A. No, sir.

Q. One of the boys at least said he did not know anything about any [63] stills being on the place, or anything of that kind there—is that right?

A. That is what they told us.

Q. That is what they told you? A. Yes, sir.

Q. These two boys—Jack Morrison was not there on the place that day at least? A. No, sir.

(Testimony of F. P. Collins.)

Redirect Examination of F. P. COLLINS by Mr. KETTER.

Q. Carbon County, the place where you found this, is in Montana? A. Yes, sir.

The Government rests.

Mr. SKINNER.—I just want to make a little motion, as far as the defendants George Doran and Mr. Graves are concerned. I don't see any testimony to connect those two boys with the still or whiskey, except that they were on the place as hired men. There might be some testimony to submit to the jury as far as the two boys are concerned, there is not any testimony, except that they were there when the agents came there.

The COURT.—You can renew your motion after dinner. You do not desire to make any statement to the jury before submitting your testimony?

Mr. SKINNER.—No, I do not care anything about that. [64]

(NOON RECESS—July 12, 1928.)

TESTIMONY OF M. G. SWAN, FOR DEFENDANTS.

M. G. SWAN, a witness called on behalf of the defendants, being first duly sworn, upon direct examination by Mr. SKINNER, testified as follows:

The COURT.—I believe counsel agrees to the correctness of that plat, if that is what you called the witness for.

(Testimony of M. G. Swan.)

Mr. SKINNER.—Most of it, your Honor, but I want to explain the situation out there, your Honor.

The COURT.—All right; go ahead.

Q. Mr. Swan, you are the county surveyor of Carbon County? A. Yes, sir.

Q. How long have you been engaged in surveying as a profession? A. All my life; all the time.

Q. How long have you been county *attorney* up there?

A. Surveyor—six years; county surveyor.

Q. And as county surveyor, have you had occasion to know the roads and location of the Morrison ranch? A. Yes, sir.

Q. You have charge of the roads, do you not, in the county? A. Yes, sir.

Q. There has been testimony in this case in reference to roads near this Morrison ranch. Will you just describe the condition of the roads there and how near they are to this ranch; for example, the road to Cody, and the road down near the river, and the different roads?

A. The old timber road, across this valley, a little below the Morrison ranch, between Red Lodge and Cody, which is still maintained as a county road. Then there were several roads up the ridge; there was one road up the ridge and another one up the [65] bottom, connecting with another cross-road, which was higher up, and an old trail that went around through the country there years ago. Of course there are better roads now, but those are still maintained as roads.

(Testimony of M. G. Swan.)

Q. Those are traveled roads now? A. Yes, sir.

Q. The county maintains them as roads?

A. Yes, sir. We are working them now, the upper one.

Q. You made this plat that is introduced in evidence? A. Yes, sir.

Q. And I note from your minutes that you made that on the 27th day of April, 1928? A. Yes, sir.

Q. Now when you were there—have you been there since that time? A. Yes, sir.

Q. And when was that, yesterday?

A. Yesterday.

Q. Did you observe the character of the land there, as to whether or not this is a dry-land ranch or irrigated ranch? A. Yes, sir.

Q. What is it?

A. It is an irrigated ranch.

Q. And did you notice about how many acres were under cultivation?

A. Well, I could not tell closely, only an approximation of it. The south 40, or about half of the 40, on the north of it, is under hay ground, is under alfalfa, and on the west side of the house, there is another field, but I did not examine it, the whole of it.

Q. It is plain hay ground, alfalfa and sweet clover, isn't it?

A. Yes, sir, and then there was some land that had been plowed up previously that is not now plowed. There were ditches, one of them coming from near the house and a little above the house,

(Testimony of M. G. Swan.)

[66] that went to the south and east, and what is shown there as the "Still Site." There was another coming from the south. I do not know how large a stream that is over there, following around above this alfalfa field and crossing the gulch above the still site.

Q. Was there any connection between the first ditch you have mentioned and the still site?

A. No, sir. They came from different sources.

Q. And about what would be the distance from the end of the ditch that you have described as running from the still site on the top of that hill?

A. I followed that ditch down and it petered out along on the ridge, probably halfway along on the hillside.

Q. From your experience in surveying, would you say that is just an ordinary irrigation ditch, or built for the purpose of supplying water to that still site?

A. I do not think it would reach the still site; it would be too low.

Q. There was not any evidence of any pipes connecting that ditch with the still site?

A. No, not that ditch.

Q. But there was some evidence of the other ditch, coming from the still site?

A. There was one—

Mr. KETTER.—Just a minute. What date is this?

Mr. SKINNER.—This was yesterday.

Mr. KETTER.—That would be too remote.

(Testimony of M. G. Swan.)

A. This is an old ditch; been there a long time.

The COURT.—Proceed, then.

A. This pipe, seventy-five or eighty feet long, was connected at the upper end with some kind of big pail or bucket, forming a funnel, through which the water was supplied to the pipe.

Q. And this ditch, Mr. Swan, and the pipe which you have described, is outside of the fence line, isn't it? [67]

A. No, I think it was inside. It was on the north side of the gulch, but the ditch ran around and crossed the gulch and came down on the north side. Now, that may have been outside the fence line. I think the fence line goes farther north than that, about eighty feet. It is eighty feet to the corner. I think that is true.

Q. And you examined the pipe-line at the residence up there, to see whether that was—had any connection at all with the still site? A. Yes, sir.

Q. That had no connection with either still site?

A. No, sir.

Q. Couldn't be used? A. No, sir.

Q. That land, adjoining the still, you know who owns that land, do you not?

A. I think that is open land. That is Government land.

Q. Where is Chappell's land; does that join this land?

A. Oh, you are referring to the first still?

Q. Yes.

A. That land is owned by L. C. Chappell.

(Testimony of M. G. Swan.)

Q. Is he a sheepman out there?

A. He is a sheep owner.

Q. And when you were there to make the survey on the 27th day of April, 1928, was there sheep wagons there in that neighborhood?

A. Yes, sir; right there in the neighborhood.

Q. Are there other people live there in that neighborhood? A. I don't think so.

Q. About how far is Chappell's house?

A. It would be about two miles down.

Q. Right down the valley, isn't it?

A. Yes, sir. [68]

Q. Right in the same valley in which the Morrison land is located? A. Yes, sir.

Cross-examination of M. G. SWAN by Mr. KETTER.

Q. When you spoke of the condition of those pipe-lines, you mean you spoke of the condition as they existed on the 28th day of April?

A. The ditches?

Q. No, the pipe-line?

A. Oh, I don't think they were disturbed.

Q. I don't want what you think. I mean, if you can say that those pipe-lines were the same on the 28th day of April as they are now?

A. I can. Grass was grown all over them.

Q. All along?

A. Oh, no; not all along. It was only partly buried. That one next to the still, I think, was buried all the way.

(Testimony of M. G. Swan.)

Q. Now, you made this plat here, and you showed a road running across the Morrison land?

A. Yes, sir.

Q. Do you not? A. Yes, sir.

Q. And that road runs from another road up to the Morrison ranch, doesn't it? A. Yes, sir.

Q. And stops there? A. As far as I know.

Q. And how far is it down to the road that that road joins on to, from the Morrison ranch?

A. Well, it is just around the corner. I would think maybe a half a mile, perhaps; little more than half a mile. [69]

Q. So that, that is the only road to the Morrison ranch; that is, the road that this one joins on to, is that right?

A. Well, this road that joins now joins half a mile below, goes up on the bench and down, and then follows around that point and had formerly connected up to the south over the hill with another branch of the creek.

Q. Well, this is the road that you use, shown here, to get up to the Morrison ranch? A. Yes, sir.

Q. Now, how many acres would you say of this land is irrigated?

A. Well, I would only—it would only be an estimate on my part, because I didn't make any measurements of it.

The COURT.—State it as close as you can.

A. I should say that there were sixty acres of alfalfa.

(Testimony of M. G. Swan.)

Q. Now, do you say that there were sixty acres irrigable, or that is irrigated?

A. Yes, sir; there is more than that that is irrigable.

Q. Where does the water come from that irrigates this?

A. It comes from the south fork of this stream.

Q. South fork? A. Yes, sir.

Q. Have they irrigation ditches all over the place? A. There were two there.

Q. Were they in operation?

A. No, they were not in operation; that is, the one next to the house was not, but they had been working on the other one, evidently hadn't needed water this season so far. They had been working on it.

Q. And how much was plowed? A. What?

Q. How much ground was plowed up there?

A. Well, there had been those sixty acres that was in alfalfa, and what amount was on the west side of the house, I could not say. [70] There was a field there in some kind of a crop.

Q. Did you see any stock around there?

A. No, sir.

Q. If there had been any there, you would have seen them, wouldn't you?

A. Well, if they had been in the hills—

Q. Well, were there any on the place?

A. Well, the place is not all quite level.

TESTIMONY OF HAROLD GRAVES, FOR DEFENDANTS.

HAROLD GRAVES, called as a witness for the defendants, being first duly sworn, upon direct examination by Mr. SKINNER testified as follows:

Q. Your name is Harold Graves? A. Yes, sir.

Q. And you are one of the defendants in this lawsuit? A. Yes, sir.

Q. How old are you, Mr. Graves?

A. Twenty-three.

Q. And you live at Red Lodge?

A. Yes, sir.

Q. How long have you lived there?

A. About eighteen years.

Q. Practically all your life there then?

A. Yes, sir.

Q. And you, of course know the defendant, Jack Morrison? A. Yes, sir.

Q. Were you present on the ranch of Jack Morrison at the time these special agents of the Government came there? A. Yes, sir.

Q. What were you working—what was you doing at the ranch at that time, Mr. Graves? [71]

A. Why, that day we were raking the yard, the day that the Federal men came there.

Q. Had you been on the ranch for some weeks?

A. About two months.

Q. And who else was working there on the ranch, if anybody? A. George Doran and his wife.

(Testimony of Harold Graves.)

Q. What was the work that you and Mr. Doran were doing there?

A. Well, I hired out to help put in that water-line. It all froze out and we had to cut the pipe and thread it, and we worked at that about a month.

Q. What is that water-line; what is it for and what is it from, what is it used for?

A. Well, it is about eight hundred yards of two-inch casing, and it comes down from up there on Gold Creek. We built a dam up there and it comes down to the house to furnish water for water power, lights and refrigerator, that is about all.

Q. Furnishes water for the house?

A. Yes, sir.

Q. Is there a toilet in the house?

A. Bath and toilet and hot-water tank.

Q. And was that water used through this pipe-line for making liquor at any time while you was on the place at all? A. No, sir.

Q. As I understand it, he had a water power plant there to make electricity? A. Yes, sir.

Q. Right there by the side of the house?

A. Yes, sir.

Q. And that plant is some distance from these still sites? A. Yes, sir.

Q. During the time you have been on this ranch working for Mr. Morrison, did you manufacture any liquor yourself? A. No, sir. [72]

Q. Did you help make any liquor? A. No, sir.

Q. Did you do any work in connection with those still sites at all? A. No, sir.

(Testimony of Harold Graves.)

Q. Those stills that the agents claim that were found there? A. No, sir.

Q. Did they know they were there until the agents told you about them? A. No, sir.

Q. Did you drive any mules hitched to a two-wheeled cart up to either one of those still sites?

A. No, sir.

Q. Haul any whiskey from them, or anything of that kind, or take any stuff up to them?

A. No, sir.

Q. There has been some evidence here to the effect that a tractor was used for the purpose of building a still site in that coulee a little bit south and east of the house. Did you have anything to do with building any still-house there, or using a tractor in connection with excavating a place for a still site there? A. No, sir.

Q. Did you observe anyone doing that while you was on the place? A. Not while I was there.

Q. Do you know anything about those two barrels of whisky that the agents claim to have found there buried by the chicken-coop?

A. No, I don't. I saw them go over and dig them up, that is all.

Q. I mean, did you know they were there before they dug them up? A. No, sir.

Q. Now, they also claim they found some barrels in the barn there, or garage, or part of the barn, in the ground. Did you know that those barrels were buried there? A. No, sir. [73]

(Testimony of Harold Graves.)

Q. Had there been anyone on the place trafficking in whisky or selling whisky, or anything of that kind, since you have been on the place, to your knowledge? A. Not to my knowledge.

Q. Now, when the agents came to the house, Mr. Denny and whoever it was, were you in the house at that time?

A. Yes, sir; we were eating dinner in the house.

Q. Who else was in the house?

A. Mr. and Mrs. Doran.

Q. Was anything said by them about searching the premises?

A. Yes, they came down to the back door and I opened it just as they came down there, and Mr. Denny says, "We are revenue men, and we are going to search this place," and two or three of them went in the basement. They made a run for the basement, and they came out of there and they asked me where Jack was, and I told them he had gone to Red Lodge to get the water-wheel fixed, and they asked several questions about the water-wheel and pipe. Then they scattered out and left. Scattered out on a search.

Q. Did you ever give them any permission to search that came there? A. No, sir.

Q. Did Jack ever give you authority to let anyone search that came there? A. No, sir.

Q. Nothing said about it? A. No, sir.

Q. I take it that Mr. and Mrs. Doran were right there and heard everything that was said and went on, in the house? A. Yes, sir.

(Testimony of Harold Graves.)

Q. Mr. Graves, have you ever been arrested in a whisky case or manufacture of whisky case, or anything of that kind? [74]

A. Never was arrested in my life.

Q. And since you have been arrested, I take it you have not worked for Mr. Morrison any longer?

A. No, sir.

Q. You were brought down to Billings and finally got a bond and went out? A. Yes, sir.

Q. And you weren't engaged in the whisky business at that time and haven't been since or before, is that right? A. No, sir.

Cross-examination of HAROLD GRAVES by Mr. KETTER.

Q. How old are you? A. Twenty-three.

Q. What did you do before you went to the Morrison place?

A. I worked around Red Lodge, I hauled coal, worked in the billiard parlor up there, done odd jobs around town.

Q. What billiard parlor was that?

A. Red Lodge Billiard Parlor.

Q. How long did you work there?

A. About a year.

Q. And what did you do before that?

A. I hauled coal for Sherill Sagendorf.

Q. What did you do after you were arrested up at this place?

A. I have just been picking up odd jobs, working at most anything I could.

(Testimony of Harold Graves.)

Q. Where?

A. I worked for Sherill Sagendorf for a day or two and worked for Weaver a day or two, and went out on a ranch for a week.

Q. You worked about a week and four days since that time, is that it?

A. Something like that. I didn't work very much. [75]

Q. Where did you meet the defendant Morrison that he engaged you to come out and repair this pipe-line, as you say?

A. Well, he met me in a place there, business place there in Red Lodge. He came in and said he was looking for a man. I said I wanted to work and he said he had this water line to put in, and I told him I was ready to go out to work for him.

Q. And where did he meet Doran?

A. I could not tell you.

Q. Did you go out to the place at that time?

A. Yes, sir.

Q. With him? A. Yes, sir.

Q. Well, when you got out there was this pipe-line in?

A. Yes, sir; but it had froze up and broke.

Q. It had frozen up and broke? A. Yes, sir.

Q. Was Doran there when you got out there?

A. Yes, sir.

Q. And how long had he been there?

A. I don't know.

Q. Did you know him before?

(Testimony of Harold Graves.)

A. Yes, I knew him in Red Lodge.

Q. Well, when you got out there, had any work been done on this pipe-line?

A. No, there had not.

Q. And you started in to repair the pipe-line right away? A. Yes, sir.

Q. What did you have to do to repair that line?

A. Well, we had to—where the pipe was split we had to take a hack saw and cut it off and put on threads and put on unions and cut a piece to join it up, and put it together and a lot of it was under the ground and had to be dug up. [76]

Q. Did you have any trouble in finding this place, where it was to be repaired?

A. Where it was underground we had to dig it up.

Q. How much did you take up?

A. Oh, possibly half of it. Four hundred yards.

Q. How deep was it covered?

A. All the way from a foot to three feet.

Q. How many worked on it?

A. Just Mr. Doran and I.

Q. What did Morrison do?

A. And Jack Morrison part of the time, when he was there.

Q. Was he there very much of the time?

A. No; just off and on.

Q. What would he do when he came out there?

A. Well, he would help us along.

Q. Well, what did he do?

(Testimony of Harold Graves.)

A. Well, he helped us dig up this pipe-line and he helped us put the threads on it, and showed us how he wanted it put back together.

Q. How long was it that he came out there after you—you went out to the place with him, didn't you? A. Yes, sir.

Q. And did he show you at that time?

A. Yes, sir; he showed me the pipe-line.

Q. Did he have any extra pipe there?

A. Well, he had some extra pipe, that we had to take most of it and saw it off and put unions and collars on it. Used all of it we could.

Q. And it took you how long to repair that pipe-line? A. About a month.

Q. And you started about when?

A. About February 25th or 26th, somewhere along there. [77]

Q. And you worked all the time at it?

A. Yes, sir.

Q. There was no place—it was broken only in one place, wasn't it?

A. No, sir; it was broken in several places. It was broken all along.

Q. Then, it must have taken a lot of new pipe?

A. No, sir, it would be broken in places where the ice had bulged it and broke it, and then joints would be broken apart.

Q. Then, after you got the pipe fixed, what was your duty?

A. Well, we broadcasted some alfalfa and put in

(Testimony of Harold Graves.)

a couple of ditches to get water on some ground he had there in alfalfa and sweet clover.

Q. Both of you work at that? A. Yes, sir.

Q. Did Jack do any of that work?

A. Yes, he helped us around there a day or two at a time.

Q. What did he put those ditches in with?

A. Put them in with mules and a Fresno.

Q. And how long did that take?

A. I don't know. We worked off and on on the ditches and fence until the Federal men came out there.

Q. What is that?

A. I say, we worked off and on at the ditches and fence. The cattle kept breaking them down. We had to work at that, and then we worked on the ditch in between times.

Q. Did he have any livestock there?

A. Yes, he did.

Q. What kind?

A. He had about thirty or thirty-five head of cattle and a bunch of horses there.

Q. The cattle were out on the range?

A. Yes, sir; some of them were inside, the milk cows. A few of them were in. The rest were out. [78]

Q. The day that the officers came out there, did you say you were working, raking the yard or something?

(Testimony of Harold Graves.)

A. We was eating dinner when they came to the house.

Q. What were you doing that day?

A. We had the mules out cleaning up a bunch of old tin cans and rubbish and stuff.

Q. How long had you been doing that?

A. We started in that morning.

Q. How much was he paying you?

A. Seventy-five dollars a month and board and room.

Q. Seventy-five dollars a month and board and room? A. Yes, sir.

Q. And do you know how much he was paying Doran? A. No; I don't know.

Q. Now, you know where this still was found up there, don't you? (Indicating on plat.)

A. I saw the smoke where they burned them.

Q. Well, you knew where that place is located?

A. Yes, sir; I do.

Q. You can see that from the barn, can't you, or not?

A. You could see the location, but you could not see any buildings or anything.

Q. Yes, you could see the location where it was?

A. I know just about where it was.

Q. Was any of this farm land up here in this forty, this 45.6 acres, was any of that farm land in there; did you do any work up in here at all?

A. Well, yes; on the right side of the road. This the road, run here?

(Testimony of Harold Graves.)

Q. Yes.

A. All of this here is in hay, and part of this. (Indicating.)

Q. And from here up to there is—that point there is visible from where this field is, isn't it? [79]

A. Well, there is a creek there or spring that comes down off the mountain, I guess.

Q. Now, did you ever notice when you went out this road that leads to the ranch-house, a trail turning off up toward that still?

A. No, sir; I was never out there, only about twice.

Q. You were out there six months—these two months and never noticed this road running up there, is that correct? A. No, sir.

Q. Did you notice a trail leading down to the other still-house?

A. Why, there is a road that goes over that way and up and through the field, goes up to the foot of the mountains.

Q. I ask you if you saw any trail leading down to that still-house? Were you ever down to that still-house? A. No, sir.

Q. That is just across the fence, isn't it; the south fence of the Morrison place?

A. Why, I guess it is outside the fence.

Q. And there is a gate that goes through there somewhere, isn't there? A. Not as I know of.

Q. Never saw a gate down there? A. No, sir.

Q. Is there a gate over here, down in this part,

(Testimony of Harold Graves.)

along this fence to the east, this edge here, to the eastern part?

A. Yes, sir; there is a gate down there.

Q. And you have gone through that gate?

A. Yes, sir.

Q. And doesn't that lead you down to this still site, the trail? A. I never saw the trail.

Q. Of course, you saw the vats there in the barnyard, didn't you?

A. No, I never saw the vats.

Q. That the agents testified to?

A. No, sir. [80]

Q. Weren't there two vats out there, visible in the farm yard?

A. There was two water storage tanks out there.

Q. Two what? A. Water storage tanks.

Q. Describe those water storage tanks?

A. Well, they were about five feet long and about four feet high, I guess, made out of about inch lumber.

Q. Was there water stored in them?

A. Not at this time. We had the water down almost to the house. We were getting water in the pipes almost to the house.

Q. No water in them at this time at all?

A. No, sir.

Q. Was there any while you were there?

A. Not while I was there.

Q. What were you doing while the agents were looking around the place for the whisky?

A. I was in the house.

(Testimony of Harold Graves.)

Q. You weren't interested enough to go out and wonder what they were doing around there?

A. No, sir; it was none of my business, I figured.

Q. You claim to have been working at this place, and when men go out to search the place, you just go into the house—

Mr. SKINNER.—Just a minute. I object to counsel arguing with the witness.

The COURT.—Sustained.

Q. You did have a Fordson Tractor there?

A. Yes, sir.

Q. And it had lugs on it? A. Yes, sir.

Mr. SKINNER.—And wheels on it and greased up, I suppose?

Mr. KETTER.—Now, I object to counsel's attitude and attempt to interrupt me. [81]

Q. And you had mules there?

A. Yes, sir; there were mules there.

Q. And there was harness on those mules at the time these agents came out there?

A. Yes, we had hauled two loads of cans away from the house, and rubbish, that morning.

Q. And you also had a cart there, or narrow-tired —narrow-tired affair there?

A. Yes, we had a wagon and cart.

Q. And Morrison would not come—would not be there—how much of those two months' time was Morrison out there?

A. Probably once or twice a week; maybe once in two weeks, and maybe there twice in one week.

(Testimony of Harold Graves.)

Q. Who had charge while he was gone?

A. There was nobody had charge.

Q. Well, who was the boss as between you and Graves?

A. There was nobody. We just had this work to do, and we just went ahead and done it.

Redirect Examination of HAROLD GRAVES by Mr. SKINNER.

Q. Mrs. Morrison was not on the ranch there, was she, Mr. Graves? A. No, sir; not at that time.

Q. You know what they were doing, that their business was in Cody? A. Yes, sir.

Q. That Mrs. Morrison had a restaurant over in Cody? A. Yes, sir.

Q. And had had for years?

A. No, sir; I have only known that for the last year.

Q. I believe you used this tractor to build roads out there also?

A. Yes, sir; that is the only way I used it. We went down to Chappell's and back with it a couple of times.

Q. How far is that; a couple of miles? [82]

A. Well, the road is about three or four miles, I guess.

Q. And when the mules weren't being used on the ranch, did you turn them loose and let them run around? A. Yes, sir.

Q. With the other stock there? A. Yes, sir.

Q. And there is nothing strange about this is

(Testimony of Harold Graves.)

there, Mr. Graves; there were chickens on the ranch and pigs and stuff of that kind? A. Yes, sir.

Q. And you have farming implements and mowers and rakes and things of that kind out there?

A. Yes, sir.

Q. There is water in the barn now, isn't there?

A. I don't know about that. I haven't been back.

Q. Or wasn't it down to the barn when you left?

A. No, we didn't put it into the barn. There had been water run to the barn.

Q. And electric lights in the barn?

(No answer.)

Mr. SKINNER.—That is all.

TESTIMONY OF GEORGE DORAN, FOR DEFENDANTS.

GEORGE DORAN, called as a witness on behalf of the defendants, being first duly sworn, upon direct examination by Mr. SKINNER, testified as follows:

Q. Your name is George Doran? A. Yes, sir.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. And how old are you, Mr. Doran?

A. Twenty-seven.

Q. Where is your home, where you live? [83]

A. Red Lodge.

Q. And how long have you lived in that neighborhood? A. About twenty-four years.

Q. Married? A. Yes, sir.

(Testimony of George Doran.)

Q. And are you working around Red Lodge?

A. Yes, sir.

Q. Support your wife? A. Yes, sir.

Q. And yourself? A. Yes, sir.

Q. Been engaged in the bootlegging business?

A. No, sir.

Q. You heard Mr. Graves testify that you were on the ranch of Jack Morrison when he got out there, with your wife; is that right? A. Yes, sir.

Q. And when did you and your wife go on the ranch to work?

A. I went out about the second of February. She did not come out until March.

Q. Were there any other women folks there on the ranch, except your wife? A. No, sir.

Q. Or was she the only one when she came?

A. Yes, sir.

Q. Was there any stock on this ranch when you got there? A. Yes, sir.

Q. What was the stock?

A. Cattle and horses and pigs and chickens.

Q. A couple of mules? A. Couple of mules.

Q. And tractor and farm machinery and stuff of that kind? A. Yes, sir. [84]

Q. Doing just the ordinary farm work out there?

A. What?

Q. Did you hire out to do ordinary farm work?

A. Yes, sir.

Q. You heard Mr. Graves testify about fixing those water mains? A. Yes, sir.

Q. Is his testimony about correct on that?

(Testimony of George Doran.)

A. Yes, sir.

Q. Is that what you fellows done out there?

A. Yes, sir.

Q. Did you make any whisky while you was out there? A. No, sir.

Q. Help make any whisky? A. No, sir.

Q. Did you know anything about this still located out in that neighborhood? A. No, sir.

Q. Did you ever go to them? A. No, sir.

Q. Did you know anything about that whisky out there by the chicken-coop that they dug up?

A. No, sir.

Q. Was it your whisky? A. No, sir.

Q. It wasn't your whisky, was it? A. No, sir.

Q. Did you have any whisky out there in barrels or otherwise? A. No, sir.

Q. You heard them testify about finding a couple of empty barrels in the garage, maybe three; did you know those barrels were buried out there in the garage? A. No, sir. [85]

Q. I believe there was an empty barrel standing up there in the garage; did you ever see that barrel, to pay any attention to it? A. No, sir.

Q. Might have been there, but you was not interested in it, is that right? A. Yes, sir.

Q. You have also heard some talk about a couple of vats; Mr. Graves said they were water tanks. Were they there when you came on the ranch?

A. Yes, sir.

Q. And in the same place that they were when the agents came there? A. Yes, sir.

(Testimony of George Doran.)

Q. Did you have anything to do with those at all?

A. No, sir.

Q. Did you haul any of the apparatus for the stills, or any supplies for the stills out there to either one of those two still sites described by the agents? A. No, sir.

Q. Did you have anything to do with them at all?

A. No, sir.

Q. Have you ever driven that Fordson tractor?

A. No, I haven't.

Q. Who drove the tractor?

A. Mr. Graves drove it.

Q. Do you know about him grading the roads?

A. Yes, sir.

Q. Dragging the roads? A. Yes, sir.

Q. Did he do any ditch work with this tractor?

A. A little.

Q. As far as you know, did you observe him having anything to do with this still site south and east of the house, drive the tractor in there; did you see him do it? [86] A. No, sir.

Q. Did you do it? A. No, sir.

Q. Now, what else did you boys do out there besides work on this pipe and care for the stock; did you do any fence work?

A. Fence work and cutting hay?

Q. Cut some hay? A. Cut some stubble.

Q. What do you mean, cut some stubble?

A. Yes.

Q. And you used the mules for that work?

A. Yes, sir.

(Testimony of George Doran.)

Q. What was that stubble, sweet clover, or something of that kind, or hay stubble?

A. No, grain, I guess.

Q. Volunteer stuff that had to be cut and raked off, is that right? A. Yes, sir.

Q. That was stuff that was no good; you just cleaned it off; is that the idea?

A. Just cleaned it off.

Q. Is there any more than ten acres of land on this ranch that can be irrigated?

A. Any more than how much?

Q. Ten acres? These men testified that there were only ten acres on this ranch that could be cultivated and irrigated.

A. There is more than that.

Q. I believe Mr. Denny testified to that, didn't he? A. Yes, sir.

Q. Now, how much land out there is there that can be cultivated and put in tame hay?

A. About 35 acres.

Q. Can that be irrigated? [87] A. Yes, sir.

Q. Are there irrigation ditches scattered all over the place? A. Yes, sir.

Q. And irrigated land? A. Yes, sir.

Q. Then, you would not call this a dry ranch?

A. No, sir.

Q. Getting down to the day that the agents came there, Mr. Doran, was you in the house there with your wife and Mr. Graves? A. Yes, sir.

Q. You heard the agents come there to the door and heard what they said, didn't you?

(Testimony of George Doran.)

A. Yes, sir.

Q. What did they say to Mr. Graves or you?

A. Didn't say anything to me.

Q. What did they say to Mr. Graves?

A. Asked him if Jack Morrison was there?

Q. Say anything about searching the place, or Federal Officers, or anything of that kind; did Mr. Graves or you give them permission to search the place? A. No, sir.

Q. Did they ask you for permission?

A. Not that I know of.

Q. You was right there where you could hear everything that was going on, weren't you?

A. Yes, sir.

Q. After they made this search, I take it you were arrested? A. Yes, sir.

Q. And taken to Billings? A. Yes, sir.

Q. Was there a milk cow on the place or two; I forgot that? A. Yes, sir. [88]

Q. It was a regular ranch? A. Yes, sir.

Q. You worked on the ranch when Mr. Swan came up to make the survey? A. Yes, sir.

Q. That was after your arrest? A. Yes, sir.

Q. But you haven't been there lately?

A. No, I haven't.

Cross-examination of GEORGE DORAN by Mr. KETTER.

Q. When did you first meet Morrison?

A. Oh, I have known him off and on three or four years.

(Testimony of George Doran.)

Q. When did you first meet Graves?

A. Him and I was just about born together, I guess.

Q. What did you do before you started to work for Morrison?

A. Used to work in the mines in Red Lodge.

Q. Did you ever do any farming?

A. Yes, sir.

Q. When? A. Lots of times.

Q. Well, when? Did you ever have any farm of your own? A. No, sir.

Q. Worked for farmers? A. Yes, sir.

Q. When did you do that?

A. Two or three years ago.

Q. How long did you work at that?

A. All winter and all summer.

Q. Where was that? A. Roberts, Montana.

Q. Well, what did you go out to this place for, the Morrison place? A. I needed work. [89]

Q. What kind of work? A. Farm work.

Q. How long had you been there before Graves got there?

A. Oh, two or three weeks, probably, couple of weeks.

Q. Had you done anything about fixing the pipe-line before Graves got there?

A. No, sir; I was looking after the cattle.

Q. When was it you started fixing the pipe-line?

A. Right after he came.

Q. And you had to dig up a lot of it?

A. Yes, sir.

(Testimony of George Doran.)

Q. Foot or two deep? A. Yes, sir.

Q. And it took about two months to fix that pipe-line? A. Oh, not two months; about a month.

Q. About a month to fix the pipe-line; and when you got through you filled the dirt back in, did you?

A. Yes, sir.

Q. And I imagine you can go up there now and see where you had taken that dirt out and put it back in? A. Yes, sir.

Q. You have been up there, and you can see that all along? A. Yes, sir.

Q. Fresh dirt? A. Yes, sir.

Q. How much was he paying you?

A. Paying me seventy-five dollars a month; me and my wife together a hundred and twenty-five.

Q. I didn't get that?

A. I was getting seventy-five dollars a month, and when my wife came out there, we got a hundred and twenty-five. She was doing the cooking. [90]

Q. I didn't get that yet?

The COURT.—When he was out there alone he got seventy-five dollars and when his wife came they both got one hundred and twenty-five.

Q. And Graves was getting seventy-five?

A. Yes, sir.

Q. Making a total of two hundred dollars he was paying you fellows? A. Yes, sir.

Q. What did he do around there?

A. He used to help us when he would be there, some with the pipe-line.

Q. How many pigs did he have? A. Two.

(Testimony of George Doran.)

Q. How many cows?

A. He had about thirty-five or forty head of range cattle and then he had two milk cows.

Q. And anything else that he had there?

A. He had about six work horses and a couple of teams—a team of mules.

Q. During the time that you were there, those cattle were ranging, weren't they? A. No.

Q. Where were they?

A. After Graves came out there we turned them out on the range.

Q. That would be about a month before you were arrested out there? A. Yes, sir; more than that.

Q. So that, from the time that Graves got out there until the time you were arrested, you spent most of your time fixing up this pipe-line and what else?

A. We fixed the pipe-line and we had to fix the electric light plant.

Q. You are an electrician, too, are you?

A. No, we just had to install a wheel is all, a water-wheel.

Q. Oh, a water-wheel; and how long did that take? [91]

A. Oh, quite a while, couple of weeks, I guess.

Q. And then what did you do besides that?

A. Fixing fence and building ditches.

Q. And that is all the work you did between the time Graves got out there and the time you were arrested? A. Yes, sir.

Q. Well, when did you sow the alfalfa?

(Testimony of George Doran.)

A. Oh, we sowed the alfalfa along between times, didn't take long for that.

Q. When? A. Just along in between times.

Q. Now, you say you sowed the alfalfa too; when did you construct the irrigation ditches?

A. What?

Q. When did you construct the irrigation ditches there to irrigate this place?

A. After we fixed the pipe-line.

Q. Then you also constructed irrigation ditches; now, didn't you?

A. Yes, sir; that is what I told you before.

Q. Were you up there with Swan the other day when he looked at this pipe-line? A. No, sir.

Q. You say there was a hundred twenty-five or thirty acres irrigated in that farm? A. Yes, sir.

Q. That is, the ditches are there and the water is there, and you can irrigate that sized piece?

A. Yes, sir.

Q. And how much of that hundred twenty-five or thirty acres is in any kind of crop?

A. About a hundred acres of hay.

Q. And what kind of hay? [92]

A. Alfalfa and sweet clover.

Q. Did you—you have gone out over that road that is shown on this map here, haven't you?

A. Yes, sir.

Q. Did you ever see a trail leading from that road—from this road to the still-house up here at the top? A. No, sir.

Q. You never saw that trail at all? A. No, sir.

(Testimony of George Doran.)

Q. Were you ever up at the still-house?

A. No, sir.

Q. You worked right up here, did you not?

A. Over here. (Indicating on plat.)

Q. Did you ever see the trail leading from the gate over here on this side, angling down through here to the still-house at the south? A. No, sir,

Q. Never saw that? A. No, sir.

Q. What did you do when the agents were searching? A. Didn't do anything.

Q. How many days was Morrison there during the time that you were there?

A. I could not tell to be exact. He was out there two or three times pretty near every week.

Q. You and Graves were the only men out there besides Morrison at the time? A. Yes, sir.

Q. I didn't get your answer to that question as to how many times Morrison came out there during the time you were there?

A. I said he came out there a couple of times a week.

Q. How long would he stay? [93]

A. Probably a day or overnight.

Q. What would he do while he was there?

A. He would help us fellows fixing the pipe-line.

Q. Helped fix the pipe-line? A. Yes, sir.

Q. And what else?

A. All the work around there, fixing fences.

Q. And how long would he stay when he would come out there?

(Testimony of George Doran.)

A. Oh, probably a day or two when he would come out there.

Q. Then where would he go?

A. I could not tell you. Probably went to Cody.

Q. How far is this place from Cody?

A. I could not tell you.

Q. Do you have any idea?

A. Probably sixty miles, I guess.

Q. How far? A. Probably sixty miles.

TESTIMONY OF MRS. GEORGE DORAN, FOR DEFENDANTS.

Mrs. GEORGE DORAN, called as a witness for the defendants, being first duly sworn, upon direct examination by Mr. SKINNER, testified as follows:

Q. You are Mrs. George Doran? A. Yes, sir.

Q. You of course are acquainted with the Jack Morrison ranch? A. I beg your pardon?

Q. You know where the Jack Morrison ranch is located, don't you? A. Yes, sir.

Q. About how long were you on the ranch before your husband was arrested?

A. I went out there the 18th of March.

Q. And he was arrested on the 18th of April?

A. Yes, sir. [94]

Q. Your husband testified that you and he together were getting $125.00 a month?

A. Yes, sir.

Q. I suppose you were to do the cooking, is that right? A. Yes, sir.

(Testimony of Mrs. George Doran.)

Q. And were you there when the agents came there? A. Yes, sir.

Q. And heard the talk between the agents and Mr. Graves? A. Yes, sir.

Q. Did Mr. Graves give them permission to make the search, or did they just say they were revenue men and were going to make the search?

A. I don't recall.

Q. Now, did you see any evidence of any liquor being made out there by your husband and Mr. Graves while you were out there? A. No, sir.

Q. Do you know anything about liquor made while you were out there? A. No, sir.

Q. Do you know anything about Mr. Morrison making any liquor while you were out there?

A. No, sir.

Q. Was he there much of the time while you were there, Mrs. Doran—I mean, Mr. Morrison?

A. Not very much.

Q. You recall that your husband and Mr. Graves worked on the fence? A. Yes, sir.

Q. And they did build the pipe-line, didn't they?

A. Yes, sir.

Q. And they looked after the teams and tractor and stuff out there?

A. Yes, sir; general farm work.

Q. You have been on the farm before, haven't you? A. Not very much. [95]

Mr. SKINNER.—That is all.

Mr. KETTER.—No cross-examination.

Mr. SKINNER.—The defendants rest.

The COURT.—Any rebuttal?

Mr. KETTER.—No rebuttal.

(Opening argument to the jury by Mr. Ketter.)

Mr. SKINNER.—Now, if your Honor please, at the close of the state's case you gave me an opportunity to make a motion and I forgot to make it, or we got to talking and I didn't get a chance to make it. Can I make it now, or have I waived my right to make it?

The COURT.—The motion is denied. You can make it, but the motion is denied.

Exception.

(Argument by Mr. Skinner to the jury.)

(Closing argument by counsel for the Government.)

INSTRUCTIONS OF THE COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: The information filed by the United States attorney against these three defendants contains four counts. The first count charges the unlawful manufacture of intoxicating liquor; the second, the unlawful possession of property designed for the manufacture of intoxicating liquor; the third, the unlawful possession of intoxicating liquor; and the fourth, the maintenance of a common nuisance, that is, the keeping of a place where intoxicating liquor was manufactured and kept in violation of the National Prohibition Act. This information is but the formal accusation placed against these defendants

by the Government. It is no evidence of their guilt, and you must not so regard it.

To the information the defendants have interposed a plea of "not guilty." That plea places in issue every material averment of the information and casts upon the Government the burden of proving every such averment to your satisfaction, and beyond a reasonable doubt. [96]

A reasonable doubt, in this connection, is such a doubt as will cause a reasonable, prudent and considerate man to hesitate or waver in the graver and more important affairs of life before acting upon the truth of the matters charged or alleged. Such a doubt may arise from the evidence or from the lack of evidence. On the one hand, you will not be moved by doubts which are purely arbitrary and capricious; on the other hand, you must not convince in the face of doubts which are real and substantial. If from a fair and candid consideration of all the testimony you can say upon your oath as jurors that you have an abiding conviction of the truth of the charges to a moral certainty, then you have no reasonable doubt and should return a verdict of guilty. If, on the other hand, you have no such moral conviction, if you have doubts for which sane and satisfactory reasons can be assigned in your own minds, you must give the defendants the benefit of that doubt and find them not guilty. This rule applies to each of the defendants and to each count of the information.

I further charge you that every person accused

of a public offense is presumed in law to be innocent of the crime charged until his guilt is established to the satisfaction of the jury and beyond a reasonable doubt. This presumption of innocence is not a mere fiction which you may disregard at pleasure. It is a substantial part of the law of the land. It accompanies the defendants throughout the trial and operates as evidence in their favor, until you are satisfied of their guilt beyond a reasonable doubt, notwithstanding the presumption of innocence with which the law surrounds them.

The testimony in this case is largely circumstantial. That is, while there is direct evidence tending to show that stills were kept and maintained as charged, a strong presumption that intoxicating liquor was manufactured as charged and direct evidence that intoxicating liquor was possessed, the testimony tending to connect these defendants with these several crimes is circumstantial only. [97] Circumstantial evidence is competent and may be sufficient to authorize a conviction, but in order to justify a verdict of guilty, the circumstances must be proved to your satisfaction and beyond a reasonable doubt; and when so proved, they must not only be consistent with the guilt of the defendants, but inconsistent with any other reasonable hypothesis. That is, if you can reconcile the testimony on any reasonable theory consistent with innocence, it is your duty to do so.

I further charge you that a person may commit a crime himself, or he may aid, abet or assist another

in its commission, and if you find beyond a reasonable doubt that these defendants committed the several crimes charged, or aided, or abetted, or assisted some other person, or persons, in their commission, it will be your duty to return a verdict of guilty.

You, Gentlemen of the Jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses on the stand; their interest in the result of your verdict, if any such interest is disclosed; their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing or knowing the facts; the probability of the truth of their testimony; their bias or prejudice, or the absence of either of these qualities, and all the facts and all the circumstances given in evidence or surrounding the witnesses at the trial.

I further charge you that if you find from the testimony that any witness has wilfully testified falsely to a material fact, you are at liberty to disregard the testimony of that witness entirely, except in so far as he may be corroborated by other credible testimony, or by other known facts in the case.

I will say in conclusion that if after a fair and candid consideration of all the testimony you are satisfied beyond a [98] reasonable doubt that the defendants unlawfully manufactured intoxicating

liquor as charged, or that they aided, abetted or assisted some other person in so doing, you will find them guilty of that charge. If not so satisfied, you will return a verdict of not guilty. If you find beyond a reasonable doubt that the defendants possessed property designed for the manufacture of intoxicating liquor, you will return a verdict of guilty as to that charge. If not so satisfied, you will return a verdict of not guilty.

In reference to the liquor found buried on the premises, the defendants as a matter of course are not guilty of possessing that liquor, unless they had knowledge of the fact that the liquor was kept and buried there. If they had such knowledge, they are guilty of that offense also; but otherwise you will find them not guilty.

I further charge you that if you find that this farm was a place where intoxicating liquor was kept in violation of law for a considerable period of time, it was a common nuisance and you will return a verdict of guilty as to that count; otherwise, you will find the defendants not guilty.

It, of course, will be competent for you to find the defendants guilty of one charge and not guilty of another, or to find some of the defendants guilty and others not guilty of the same charge, according to the facts as you may find them.

Anything else, Gentlemen? (No exceptions.)

I will further add that the defendants are competent witnesses in their own behalf, but they are under no obligation to testify and you must draw no

inference of guilt against the one defendant who failed to take the witness-stand and testify in his own behalf.

You may now retire and consider of your verdict. [99]

Thereupon the jury, duly impaneled, in the above-entitled cause, retired to the jury-room and afterwards reported the following verdict:

(The Clerk will here insert a true copy of the verdict of the jury together with the endorsements of the filing date and date of the verdict in open court.)

And thereafter and on the 14th day of July, A. D. 1928, the above-named court imposed sentence upon said defendants and judgment was thereupon duly entered, which said judgment is as follows:

(The Clerk will here insert the judgment of the Court.)

On said day the Judge of this court granted the defendants sixty days and until September 15th, 1928, within which to file bill of exceptions and perfect their appeal of this case to the Circuit Court of Appeals for the Ninth Circuit, and that on or about September 15, 1928, pursuant to stipulation of attorneys for the respective parties, the Court granted a further extension of time in which to prepare, serve and file bill of exceptions and to perfect an appeal to said court.

(The Clerk will here insert the minutes of the Court in reference to said orders.)

WHEREFORE, within the time allowed by law and the orders of the Court aforesaid extending said time for the preparation, filing and serving of the bill of exceptions of said defendants, the said defendants herein tender and present this, their proposed bill of exceptions herein, and file and serve the same upon the adverse party, and pray that the same may be signed, settled and allowed and ordered filed herein as part of the record in this case.

JOHN G. SKINNER,
Attorney for Defendants.

Personal service of the above and foregoing bill of exceptions made and admitted, and receipt of copy thereof acknowledged, this 13th day of October, A. D. 1928.

L. V. KETTER,
Asst. U. S. Atty.,
Attorney for Plaintiff. [100]

The above and foregoing proposed bill of exceptions of the defendants and the foregoing admission of service thereof of the adverse party, filed with the undersigned Clerk of said court this —— day of October, A. D. 1928.

_____,
Clerk of Said Court.

In the above-entitled cause, it is hereby stipulated by and between the plaintiff and defendants, through their respective attorneys of record in said cause, that the above and foregoing bill of exceptions of the defendants is in all respects full, true and correct, and may be forthwith signed, settled

and allowed and ordered filed in said cause as and for the bill of exceptions in said cause.

L. V. KETTER,
Asst. U. S. Atty.,
Attorney for Plaintiff.
JOHN G. SKINNER,
Attorney for Defendants.

ORDER SETTLING BILL OF EXCEPTIONS.

I, the undersigned, one of the Judges of the District Court of the United States of America, do hereby certify as such judge that the above and foregoing bill of exceptions contains all of the evidence, both oral and documental, introduced at the trial thereof and all proceedings had thereat, and all the exceptions taken, and is in all respects full, true and correct, and further, that the said bill of exceptions have been duly and regularly presented this day to me to be settled within the time allowed by law, as extended by order of said Court, and is now recorded by me, the undersigned Judge, signed, settled and allowed as and for the bill of exceptions of said defendants and thereupon it is ordered filed as a part of the record and judgment-roll in the said cause.

Dated October 15, A. D. 1928.

CHARLES N. PRAY,
Judge of said District Court.

Filed Oct. 15, 1928. [101]

THEREAFTER, on October 15th, 1928, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [102]

(Title of Court and Cause.)

CITATION ON APPEAL.

The President of the United States to the United States of America and to the United States District Attorney for the District of Montana, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, thirty days from and after the day this citation bears date, pursuant to an order allowing an appeal filed in the Clerk's office in the United States District Court in and for the District of Montana, Billings Division, in a case wherein the United States of America is plaintiff and George Doran, Jr., Harold Graves and J. D. (Jack) Morrison are defendants, to show cause, if any there be, why the judgment rendered against the said defendants, George Doran, Jr., Harold Graves and J. D. (Jack) Morrison, as in said order allowing an appeal mentioned, should not be corrected and reversed, and why speedy justice should not be done the parties in that behalf.

Dated this 15th day of October, 1928.

CHARLES N. PRAY,
United States District Judge for the District of Montana.

Due and personal service of the foregoing citation is hereby admitted this 15th day of October, 1928.

L. V. KETTER,
Assistant U. S. Attorney. [103]

[Endorsed]: Filed Oct. 15th, 1928. [104]

THEREAFTER, on October 22d, 1928, cost bond on appeal and supersedeas bonds of defendants were duly filed herein, in the words and figures following, to wit: [105]

(Title of Court and Cause.)

COST BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, George Doran, Jr., Harold Graves, and J. D. (Jack) Morrison, as principals, and Joe Uzelac and Geo. Doran, Sr., as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents.

SEALED with our seals and dated this 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight.

WHEREAS, lately at the July Term, A. D. 1928, of the District Court of the United States for the District of Montana, in a suit depending in said court between United States of America, plaintiff, and George Doran, Jr., Harold Graves and J. D. (Jack) Morrison, defendants, judgment and sentence was rendered against the said defendants, and the said defendants have appealed from said judgment and sentences to the United States Circuit Court of Appeals for the Ninth Circuit, and that an order of the District Court was made by said Court, allowing said appeal, and a citation dated October 15, 1928, directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, thirty days from and after the date of said citation, which said citation has [106] been duly served.

Now, the condition of the above obligation is such that if the said George Doran, Jr., Harold Graves and J. D. (Jack) Morrison shall prosecute said appeal to effect and answer all damages and costs if appellants fail to make good their plea, then the

above obligation to be void, else to remain in full force and virtue.

GEO. DORAN, Jr., (Seal)
HAROLD GRAVES, (Seal)
J. D. JACK MORRISON, (Seal)
Principals.
JOE UZELAC, (Seal)
GEO. DORAN, Sr., (Seal)
Sureties.

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF FIRST SURETY.

Joe Uzelac, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of Carbon, State of Montana, in said district; that he is a freeholder in the District of Montana; that he is worth the sum of Two Hundred Fifty Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real Property Lot No. 17–18, Block No. 3 Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

JOE UZELAC.

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

[Seal] E. B. PROVINSE,
Notary Public for the State of Montana, Residing at Red Lodge, Montana.
My commission expires June 30, 1929. [107]

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF SECOND SURETY.

Geo. Doran, Sr., a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of Carbon, State of Montana, in said district; that he is a freeholder in the District of Montana; that he is worth the sum of Two Hundred Fifty Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of Real Property Lot No. 2, Block No. 19, Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

GEORGE DORAN, Sr.

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

E. B. PROVINSE,
Notary Public for the State of Montana, Residing at Red Lodge, Montana.
My commission expires June 30, 1929.

Filed October 22, 1928. [108]

(Title of Court and Cause.)

SUPERSEDEAS BOND (HAROLD GRAVES).

KNOW ALL MEN BY THESE PRESENTS, that we, Harold Graves, as principal, and Joe Uze-

lac and Geo. Doran, Sr., as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight.

WHEREAS, lately at the July Term, A. D. 1928, of the District Court of the United States for the District of Montana, in a suit depending in said court between United States of America, plaintiff, and George Doran, Jr., Harold Graves and J. D. (Jack) Morrison, defendants, judgment and sentence was rendered against the said Harold Graves and the said defendant, Harold Graves, has appealed from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, and that an order of the District Court was made by said court, allowing said appeal, and a citation dated October 15, 1928, directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, thirty days from and after the date of said citation, which said citation has been duly served.

Now, the condition of the above obligation is

such, that if the said Harold Graves shall appear either in person or [109] by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said appeal and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed; or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States for the District of Montana on such day or days as may be appointed for a retrial by said District Court of the United States, for the District of Montana, and abide by and obey all orders made by said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

HAROLD GRAVES, (Seal)
Principal.
JOE UZELAC, (Seal)
GEO. DORAN, Sr., (Seal)
Sureties.

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF FIRST SURETY.

Joe Uzelac, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of Carbon, State of Montana, in said district; that he is a freeholder in the District of Montana, that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real Property Lot No. 17–18 Block No. 3 Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

JOE UZELAC. [110]

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

[Seal] E. B. PROVINSE,
Notary Public for the State of Montana, Residing at Red Lodge, Montana.
My commission expires June 30, 1929.

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF SECOND SURETY.

Geo. Doran, Sr., a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of

Carbon, State of Montana, in said district, that he is a freeholder in the District of Montana; that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real Property, Lot No. 2, Block No. 19, Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

GEO. DORAN, Sr.

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

[Seal] E. B. PROVINSE,

Notary Public for the State of Montana, Residing at Red Lodge, Montana.

My commssion expires June 30th, 1929.

Filed October 22, 1928. [111]

(Title of Court and Cause.)

SUPERSEDEAS BOND (GEORGE DORAN, Jr.).

KNOW ALL MEN BY THESE PRESENTS, that we, George Doran, Jr., as principal, and Joe Uzelac and Geo. Doran, Sr., as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight.

WHEREAS, lately at the July Term, A. D. 1928, of the District Court of the United States for the District of Montana, in a suit depending in said court between United States of America, plaintiff, and George Doran, Jr., Harold Graves and J. D. (Jack) Morrison, defendants, judgment and sentence was rendered against the said George Doran, Jr., and the said defendant, George Doran, Jr., has appealed from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, and that an order of the District Court was made by said Court, allowing said appeal, and a citation dated October 15, 1928, directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, thirty days from and after the date of said citation, which said citation has been duly served.

Now, the condition of the above obligation is such, that if the said George Doran, Jr., shall appear either in person or [112] by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said appeal and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said

cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed; or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States for the District of Montana on such day or days as may be appointed for a retrial by said District Court of the United States, for the District of Montana, and abide by and obey all orders made by said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

GEO. DORAN, Jr., (Seal)
Principal.
GEO. DORAN, Sr., (Seal)
Sureties.

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF FIRST SURETY.

Joe Uzelac, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of Carbon, State of Montana, in said district; that he is a freeholder in the District of Montana, that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his

property consists of: Real Property Lot No. 17–18 Block No. 3 Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

JOE UZELAC. [113]

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

[Seal] E. B. PROVINSE,

Notary Public for the State of Montana, Residing at Red Lodge, Montana.

My commission expires June 30, 1929.

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF SECOND SURETY.

Geo. Doran, Sr., a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of Carbon, State of Montana, in said district, that he is a freeholder in the District of Montana; that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real Property Lot No. 2 Block No. 19 Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

GEO. DORAN, Sr.

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

[Seal] E. B. PROVINSE,

Notary Public for the State of Montana, Residing at Red Lodge, Montana.

My commission expires June 30th, 1929.

Filed October 22, 1928. [114]

(Title of Court and Cause.)

SUPERSEDEAS BOND (J. D. (JACK) MORRISON).

KNOW ALL MEN BY THESE PRESENTS, that we, J. D. (Jack) Morrison, as principal, and Joe Uzelac and Geo. Doran, Sr., as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said United States of America, to which payment well and truly to be made, we find ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight.

WHEREAS, lately at the July Term, A. D. 1928, of the District Court of the United States for the District of Montana, in a suit depending in said court between United States of America, plaintiff, and George Doran, Jr., Harold Graves and J. D. (Jack) Morrison, defendants, judgment and sen-

tence was rendered against the said defendant and the said defendant, J. D. (Jack) Morrison has appealed from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, and that an order of the District Court was made by said Court, allowing said appeal, and a citation dated October 15, 1928, directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, thirty days from and after the date of said citation, which said citation has been duly served.

Now, the condition of the above obligation is such, that if the said J. D. (Jack) Morrison shall appear either in person or [115] by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said appeal and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States for the District of Montana on such day or days as may be appointed for a retrial by said District Court of the United States, for the District of Montana, and abide and

obey all orders made by said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit; then the above obligation to be void; otherwise to remain in full force, virtue and effect.

J. D. (JACK) MORRISON, (Seal)
Principal.
JOE UZELAC, (Seal)
GEO. DORAN, Sr., (Seal)
Sureties.

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF FIRST SURETY.

Joe Uzelac, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of Carbon, State of Montana, in said district; that he is a freeholder in the District of of Montana, that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real Property Lot No. 17–18 Block No. 3 Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

JOE UZELAC. [116]

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

[Seal] E. B. PROVINSE,

Notary Public for the State of Montana, Residing at Red Lodge, Montana.

My commission expires June 30, 1929.

United States of America,
District of Montana,
Billings Division,—ss.

AFFIDAVIT OF SECOND SURETY.

Geo. Doran, Sr., a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at the city of Red Lodge, in the county of Carbon, State of Montana, in said district, that he is a freeholder in the District of Montana; that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real Property Lot No. 2 Block No. 19 Original Plat of Red Lodge, Mont., located at Red Lodge, Mont.

GEO. DORAN, Sr.

Subscribed and sworn to before me this 17th day of October, A. D. 1928.

[Seal] E. B. PROVINSE,

Notary Public for the State of Montana, Residing at Red Lodge, Montana.

My commission expires June 30th, 1929.

Filed October 22, 1928. [117]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 117 pages, numbered consecutively from 1 to 117, inclusive, is a full, true, and correct transcript of the record and proceedings in the within-entitled cause, as appears from the original files and records of said Court and cause in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said papers the original citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Fifty-two and 75/-100 Dollars ($52.75), and have been paid by the appellants.

WITNESS my hand and the seal of said Court at Great Falls, Montana, this 30th day of October, A. D. 1928.

[Seal] C. R. GARLOW,
Clerk as Aforesaid. [118]

[Endorsed]: No. 5622. United States Circuit Court of Appeals for the Ninth Circuit. George Doran, Jr., Harold Graves and J. D. (Jack) Morrison, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed November 2, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622

United States
Circuit Court of Appeals

For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and J. D. (JACK) MORRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Brief

JOHN G. SKINNER,

Attorney for Appellants.

WELLINGTON D. RANKIN, United States District Attorney,

Attorney for Appellee.

CARBON COUNTY NEWS. RED LODGE, MONT.

INDEX

	Page
Statement of the Case	1
Specifications of Error	3
Argument	4

TABLE OF CASES CITED

	Page
Agnello v. U. S., 70 Law Ed. 1, U. S. Sup. Ct.	7
Hester v. U. S., 44 Sup. Ct. Rep. 445	6
Lambert et al. v. U. S., 26 Fed. (2d) 773	8
Malewicki v. Quale, 298 Fed. 391	6
U. S. v. Armstrong, 275 Fed. 506	7
U. S. v. Gass, 14 Fed. (2d) 229	6

No. 5622

United States

Circuit Court of Appeals

For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and
J. D. (JACK) MORRISON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellants' Brief

CARBON COUNTY NEWS, RED LODGE, MONT

STATEMENT OF THE CASE.

The appellants were convicted in the United States District Court of the State of Montana, at Billings, Montana, on July 13th, 1928. The defendant, Morrison, was found guilty on all four counts of the Information. The other two defendants were found guilty as to counts three and four.

A motion to suppress the evidence was filed in said court on June 9th, 1928. The motion was submitted to the court and oral testimony introduced by the Government, but this testimony was not taken by a stenographer. The motion was denied by the Trial Judge.

The facts are as follows: three Federal Prohibition Agents and a Wyoming state enforcement officer came to the farm of the defendant, Morrison, on Gold Creek, Carbon County, State of Montana, on the 18th day of April, 1928. Morrison was not at home. The defendants, Graves and Doran, and Mrs. Doran were in the farm home, having lunch. There is a dispute as to whether or not the defendants Graves and Doran told the officers to go ahead and make the search. Some of the officers say that they were given permission. The defendants say not. But there is no evidence in the case that Morrison authorized the search, or authorized the two men working for him, or any one else, to give that permission. All agree that the alleged still sites were not within the fence lines of the Morrison ranch. On page 15 of the transcript will be found a plat prepared by the county surveyor, showing the Morrison ranch, also showing the location of the still sites, so-called. The survey was not disputed, so we can assume that the plat and survey are correct.

There was no objection made to the introduction of any

evidence concerning the alleged stills, or sites. The motion was to suppress the introduction of any testimony concerning any liquor found on the ranch of the defendant, Morrison, or anything disclosed by reason of the search of the ranch. No one was at the still sites at the time of the search. The stills were not in operation, and were not set up. One had apparently never been operated. There was some mash found, also boilers, coils, etc.

Morrison did not testify. The other two defendants testified that they were employed by Morrison, described the work they were doing, and had been doing; they denied any knowledge of any liquor being manufactured or kept on the place, or adjacent thereto, and there was no direct evidence of any connection between the two defendants, Graves and Doran, and any liquor or the manufacture thereof.

The only evidence against the defendant, Morrison, was that he owned the place; that he was there occasionally—possibly once a week during the short period of time that these two men, the other defendants, had been employed on the place.

The evidence discloses that there was no arrest made until the search of the premises and the still sites had been made. The evidence discloses that the barrels of liquor and the empty barrels were buried in the ground—two near the chicken house, and three empty barrels in the blacksmith shop or garage. The farm was enclosed with a fence and the buildings on the place were in a farm yard and in close proximity to the house. The barrels were found by the agents by using an iron rod which, they say, they pushed into the ground at various places until they discovered the barrels. There is no evidence in the case as to the length of time Morrison has owned

the place, and no direct evidence as to his knowledge that the liquor was on the place. The barrels containing whiskey were found at the corner of the chicken house. The three barrels buried in the blacksmith shop were empty barrels, but the agent testified that they had at some time contained whiskey. The defendants testified that the tanks found by the agent, near the barn, were water tanks that they had not yet placed in the ground.

This is not the ordinary whiskey-making farm, but the evidence discloses that from one hundred to one hundred sixty-five acres of this place was irrigated land. There were substantial farm buildings, the house was electric lighted, with modern conveniences, and was situated adjacent to a number of main traveled roads. The still sites were hidden—one in a coulee on the side of a hill, and the other in a "wash" or coulee. The agents testified as to certain mule tracks, tractor tracks and wheel tracks. This testimony is the only connecting link, if any, that might tend to establish the defendant's connection with the liquor operations.

At the opening of the trial, I asked permission to renew the motion to suppress the testimony. This was denied, and the testimony in reference to what the agents found on the premises went in under my objections. At the close of the plaintiff's case I asked that the two defendants, Doran and Graves, be discharged. This was denied, with the right to renew at the close of the case. This was done, and the motion denied.

SPECIFICATIONS OF ERROR.

1. The trial Judge erred in deciding that the search of defendants' premises and farm was legal.

2. The said Court erred in overruling defendants'

written motion to suppress the evidence herein made and filed prior to the trial of said cause.

3. The said Court erred in overruling defendants' oral motion to suppress the evidence, same made at the conclusion of the Government's case.

4. The said Court erred in refusing to grant the motion immediately at the close of the plaintiff's case.

5. The said Court erred in denying defendants' motion immediately at the close of the trial.

6. There was no evidence lawfully obtained to sustain the verdict herein.

7. There is not sufficient or any evidence upon which the verdict of the jury should be allowed to stand.

8. The verdict is against the law.

9. The verdict is against the evidence.

10. The said Court erred in giving and rendering judgment against said defendants on such verdict.

ARGUMENT.

The first three assignments of error will be argued together. The Government agents made the search without a warrant. This we contend was not lawful under the circumstances disclosed in the testimony. The agents were trespassers, for it is evident that they went to this farm and farm home for the purpose of making a search of the premises. They were not fortified with a search warrant, legally issued. If they had ample evidence, or any evidence, that would justify a search of the premises, no reason was given or offered by the agents, or any of them, for not obtaining a search warrant from the proper court or commissioner, authorizing and directing them to search the premises. It would seem that in the orderly administration of justice and the enforcement of the National Prohibition Act, the government officers

and employees should be required to follow the procedure provided in the Federal Statutes and that they should not be permitted to arbitrarily make searches of homes, residences, farms and farm buildings indiscriminately. It is true in this case that they found liquor, but that does not justify an unlawful search. If the agents had evidence, or reports had been made to them of the law being violated on these premises by these defendants, or any of them, and this was sufficient to warrant the court to order a search, the better practice would have been to have obtained a search warrant and then the defendants would not be in a position to object.

It is difficult to reconcile the decisions of the various courts on this question. Some courts grant more leeway than others. But in this case, if the agents had the right, without making an arrest, to go on these premises, taking an iron bar and push or drive it into the ground at different places on the ranch until and when they discovered some obstruction in the ground, and, upon excavating, find the evidence of liquor or barrels of liquor—if that is not a violation of the defendants' constitutional rights, the officers would have the right to excavate the whole farm of the defendant in making a search, and the defendant could not protest or object thereto.

Now, in this case, there isn't any evidence as to the information imported to the agents, and we will have to assume that the agents went to this place without any information whatsoever and proceeded to dig around until they found the evidence complained of. We have no complaint to make as to the search of the still sites, for these were not within the boundary lines or fence lines of the defendant's ranch.

The testimony discloses that the agents drove to the

house. Agents Collins and Denny went to the door and asked if Mr. Morrison was at home (Tr. pp. 34, 41, 60.) Not finding him at home, they proceeded to search the house. They afterwards found the still sites, and after finding those, they made the search of the premises and barnyard of the defendant, Morrison, which we complain of.

No power exists at common law to make a search and seizure without a warrant. Malewicki v. Quale, 298 Fed. 391. The fact that liquor was found does not justify or make legal the search. We are only complaining in this case of the introduction of the liquor insofar as the appellant, Morrison, is concerned, for under the authorities, objections to a search can be made only by the owner or by one in possession. U. S. v. Gass, 14 Fed. (2nd) 229.

I am familiar with the case of Hester v. U. S., 44 Sup. Ct. Rep. 445, in which the Court says that the special protection accorded by the fourth amendment to the people in their "persons, houses, papers and effects," is not extended to open fields, and I have no fault to find with that decision, but in the case at bar the barrels of whiskey were not exposed. They were covered and buried in the ground. Nothing was done by any of the defendants while the agents were there, in connection with the barrels. Hence, the agents must have been informed as to the location of the liquor and must have known where to make the search to find it, for they did not testify that there was anything in the appearance of the ground where the liquor was found, outside of the blacksmith shop, nor inside of the blacksmith shop, and hence I submit that it was the duty of the officers to have obtained a search warrant in order to make the search legal and the evidence discovered, admissible.

I have not been able to find any case where the facts are similar to the facts in this case, and therefore am not citing any cases. The principle of the law has been determined by this court in a number of cases. It is just a question of whether the facts in this case warranted the search. Liquor was found within the enclosure of the farm buildings. The buildings were close together, and about fifty or sixty yards from the house. The defendants were residing on the place, making it their home, and I contend that the immediate farm yard is appurtenant to and a part of the home and residence. There being no evidence of the sale of liquor, or the manufacture of liquor in the home, this testimony, under the case of Agnello v. U. S., 70 Law Ed. 1, U. S. Sup. Ct., and the case of U. S. v. Armstrong, 275 Fed. 506, was not admissible, and the search was unlawful. There is nothing in the testimony that would warrant the court in finding that these parties were likely to get away, or that the liquor, stills, or still sites would be removed.

The other six assignments will be argued together, for they involve the question as to whether or not there was sufficient, or any evidence upon which the verdict of the jury should be allowed to stand. Summing up this evidence, it is apparent that the appellants Doran and Graves were employees of appellant Morrison. Both had been working but a short period of time. Both disclaimed any knowledge of the violation of the National Prohibition Act to the Prohibition officers (Tr. p. 38.) These two defendants were convicted on the third and fourth count of the Information; that is, possession of liquor and maintaining a nuisance, and I submit that there isn't any testimony from which it can be inferred that these defendants had any knowledge of the buried liquor, and

that is the only liquor that was found by the officers on the premises.

The instruction of the Trial Judge (Tr. p. 101) is the law in this case, and it is the law in all criminal cases where circumstantial testimony is relied upon for a conviction. It would seem just as reasonable to assume that these two defendants had no knowledge of the buried liquor as it would to assume that they did have knowledge of the liquor. There was no liquor in the house, and there was no liquor at any other place on the ranch, and it is just as reasonable to assume that they had no knowledge whatsoever concerning the violation of the National Prohibition law as that they did have knowledge of it. There isn't any evidence of a sale, no evidence that Morrison was engaged in hauling liquor, or selling liquor. Neither is there any evidence that he was engaged in the manufacture of liquor, or that these two defendants participated in the manufacture of liquor. The testimony shows that they were employed for a lawful purpose and their employment is described at length in the testimony.

In the case of Lambert, et al. v. U. S., 26 Fed. (2d) 773, the Court said:

> "He was employed in the place for a lawful purpose and the most and the worst that can be said against him is that he knew what was going on about him, but for this he was not prosecuted, and such knowledge, on his part, standing alone, did not constitute a crime."

And that is all that we have in this case. There is some evidence about some tracks, but there isn't any evidence that these two appellants had any knowledge of the manufacture of any liquor in either of these two stills, or at these two still sites. There isn't any evidence in the case

that these stills have been operated, nor when they had been operated, if ever, or that they had been operated by any of these appellants. The mere fact that there were stills outside of the premises of the appellant, Morrison, is only a circumstance. They may have been there for some time. It might be that these men were installing a still for the purpose of manufacturing liquor, but we were not convicted of that. But there is evidence, as I see it, that the still found in the "wash" or "draw" had not been operated, (Tr. p. 35.) These two appellants must have been found guilty, if at all, upon circumstantial evidence, and the court in charging the jury in reference to the possession charge, said as follows (Tr. p. 103):

> "In reference to the liquor found buried on the premises, the defendants as a matter of course are not guilty of possessing that liquor, unless they had knowledge of the fact that the liquor was kept and buried there. If they had such knowledge, they are guilty of that offense also; but otherwise you will find them not guilty."

and this immediately became the law in the case. Likewise, the Court said in reference to the nuisance charge (Tr. p. 103):

> "I further charge you that if you find that this farm was a place where intoxicating liquor was kept in violation of law for a considerable period of time, it was a common nuisance and you will return a verdict of guilty as to that count; otherwise, you will find the defendants not guilty."

In the first place, the record is barren of testimony showing any actual knowledge on the part of these two defendants of the liquor in question. It is likewise barren as to any facts showing that the liquor had been kept

in violation of law for a considerable period of time and this was necessary under the charge of the court in order to constitute a nuisance. There is not a word in the testimony of these two defendants that would tend to incriminate them except possibly that they were on the place and employed there, and might possibly have known what was going on.

Now, in reference to appellant Morrison: Morrison did not testify. The only evidence against Morrison is that he was the owner of the farm in question, but as to when he became the owner there is no testimony, other than that the defendant, Doran, commenced working on the ranch on February 2, 1928 (Tr. p. 87), so that it can be assumed that Morrison owned the ranch at that time and from then on. The witnesses, Doran and Graves, testified that Morrison was over there possibly twice a week and stayed over night, and possibly a day or two (Tr. pp. 84, 96, 97.) There isn't any connection with Morrison and the stills or the liquor or the buried barrels, other than the fact that he was the owner of the ranch and was out there occasionally during the two month period. As far as the evidence in this case is concerned, it might have been proper for the jury to find the two appellants Doran and Graves guilty of manufacturing liquor or of possessing property designed for the manufacture of liquor, but Morrison is not, and was not connected up in this testimony of having knowledge of the two still sites and stills. It is just as reasonable to suppose that he had no knowledge of the liquor, stills, or still sites, as to suppose that he did.

So that the jury did not follow the instructions of the court in arriving at their verdict. I have no complaint to make as to the charge of the Trial Judge. The charge

is clear, concise and fair to the defendants. In fact, in my humble opinion, it is a model charge, and if the jury had followed the instructions of the court this case would not be here.

Upon my oral argument of this case I will go more into details as to the testimony.

In conclusion, it is respectfully sumitted that the judgments entered in this case should be reversed.

Respectfully submitted,

JOHN G. SKINNER,
Attorney for Appellants.

No. 5622

United States Circuit Court of Appeals

For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and J. D. (Jack) MORRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

WELLINGTON D. RANKIN,
United States Attorney,

ARTHUR P. ACHER,
Assistant United States Attorney,
Attorneys for Appellee.

Filed, ... 1929.

INDEX

	Page
Statement of the Case	1
Argument	4-17
The search was legal	5
Consent to search	9
The evidence is sufficient to support the verdict	10

CASES CITED

	Page
Baldwin v. United States, 5 F. (2d) 133	10
Carroll v. United States, 267 U. S., 132	5
Cohen v. United States, 214 Fed. 23	11
Donegan v. United States, 296 Fed. 843	17
Dulek v. United States, 16 F. (2d) 275	8
Fitzgerald v. United States (6th Cir.) 29 F. (2d) 881	11
Gentili v. United States (9th Cir.) 22 F. (2d) 67	7, 12
Hester v. United States, 265 U. S. 57	8
Locke v. United States, 7 Cranch 338	5
McGuire v. United States, 273 U. S., 95	6
Pleich v. United States, (9th Cir.) 20 F. (2d) 383	12
Parks v. United States, (4th Cir.) 297 Fed. 834	12
Raine v. United States, (9th Cir.) 299 Fed. 407	9
Schnorenberg v. United States, (7th Cir.) 23 F. (2d) 38	5, 6, 9
Schutte v. United States, (6th Cir.) 21 F. (2d) 830	10
Swenzel v. United States, (2nd Cir.) 22 F. (2d) 280	15
The Thompson, 3 Wall, 155	5
United States v. Houghton, 14 Fed. 544	16

No. 5622

United States Circuit Court of Appeals

For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and J. D. (Jack) MORRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

STATEMENT OF THE CASE

This is an appeal from the United States District Court wherein there was judgment and sentence on conviction of appellants George Doran, Jr., and Harold Graves for unlawful possession of intoxicating liquor and maintaining a nuisance in violation of the National Prohibition Act, and on conviction of appellant J. D. (Jack) Morrison for unlawful manufacture of intoxicating liquor, possession of property designed for the manufacture, possession of liquor and maintaining a nuisance.

Appellant's statement of facts is inadequate. Prohibition Agents Myers, Collins, Denny and Wyoming State Enforcement Officer Owens drove up to the Morrison ranch on April 18, 1928. It appears that they arrived about noon and defendants Graves, Doran and Mrs. Doran (Tr. 98) were eating dinner. Agents Collins and Denny went to the back door. Agent Collins testified that one of the defendants, later identified as defendant Graves (Tr. 42) came to the door and told the officers to go ahead and make a search (Tr. 62) and his testimony was corroborated by that of Agent Denny (Tr. 35). The ranch is situated in rough country in a little basin and consists of about one-hundred and sixty acres (Tr. 36). Denny testified that he knew that the defendant Morrison had lived there since 1927 (Tr. 36). The agents followed the tracks of a two wheel cart and a "pair" of mules from the house about three-quarters of a mile southeast and found a still house that had just been completed, which contained mash vats, pressure tank and burner and then followed the same tracks in an easterly direction where they found another still house in which were found a number of mash vats, about seven-hundred gallons of mash (Tr. 35-36), and three stills in the sage brush about fifty feet from the still house (Tr. 36, 51).

The agents now returned to the ranch buildings where they found two 50-gallon barrels full of moonshine whiskey buried in the earth about ten feet from the corner of the chicken house, two 50-gallon barrels that had contained whiskey buried in the blacksmith shop, and two vats in front of the barn or black-smith shop, that were similar to those found at the still sites (Tr. 35, 45).

The chicken house was forty or fifty yards from the house (Tr. 60).

The government witnesses stated that there were two mules in the barn and a two-wheel cart in the yard (Tr. 37) and that mule tracks and tracks of a kind that would be made by a cart of this character led to both still sites (Tr. 36) from the ranch premises. Agent Denny said it appeared *that these mules had been over the trail four or five times in the last two or three days* (Tr. 44). *The tracks went no further than to the location of the stills* (Tr. 44) and *there is evidence that the trails themselves went no further.* (Tr. 52, 56).

The government's agents further stated that the still house south of the ranch had been constructed recently. They stated that there were marks or tracks about the still house made by a tractor used to "scrape out the new still house" (Tr. 37, 56, and 57). The tractor was found near the ranch buildings with lugs on the wheels which made tracks corresponding to the tracks found at the still site (Tr. 37, 57). There is further testimony to indicate that there was a pipe line running from one of the still houses to a point near the dwelling (Tr. 47). The surveyor testifying for defendants said there was no connection between the ranch water pipe and the still sites, but his testimony indicates that a water pipe extended from one of the ranch irrigation ditches from a point inside of the ranch premises to one of the still sites (Tr. 68).

The agents testified that the nearest house where people lived was three and one-half to four miles from the premises (Tr. 49). The surveyor testifying for de-

fendants said he did not think there were other people living in the neighborhood and that it was about two miles to the nearest house (Tr. 69). He stated that some days after the date of the offense charged, he saw "sheep wagons in the neighborhood" (Tr. 69).

Defendants Graves and Doran testified in their own behalf, stating that they had worked on the ranch for Morrison for about two months (Tr. 72, 87), that they had been fixing the water line (Tr. 73), broadcasting alfalfa, (Tr. 79) making ditches (Tr. 80), fixing fences (Tr. 80), and other ranch work. They stated they used the tractor and the mules found on the premises in the farm work and in making ditches (Tr. 84, 89). Defendant Graves said that Morrison came to the ranch once or twice a week (Tr. 84). Doran said Morrison came three times "pretty nearly every week" (Tr. 96). They denied any knowledge of the presence of liquor on the premises (Tr. 74, 88), or of the stills and still sites (Tr. 74, 89), and said *while the place where one of the sites is located could be seen from the barn,* they had never seen the still house (Tr. 81) or the trails leading to them (Tr. 82, 95, 96). There was no evidence that persons other than these defendants were on the premises during the times the defendants Doran and Graves worked on the ranch.

ARGUMENT

The first question is whether the search of the ranch premises, which disclosed the two fifty-gallon barrels of whiskey buried near the chicken house, was legal.

Appellants concede in their brief on Page 5: "We

have no complaint to make as to the search of the still sites, for they were not within the boundary lines or fence line of the defendant's ranch." On page 7: "I contend that the immediate farm yard is appurtenant to and a part of the home and residence."

The Search Was Legal

A search without a warrant of any building or property other than a dwelling is valid without a warrant if on reasonable or probable cause. Carroll v. United States, 267 U. S. 132, 162. In the Carroll case, supra., the Court defined probable cause.

> "That is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."

Probable cause was early in the history of this country defined as existing: "When there are circumstances sufficient to warrant suspicion even though not sufficient to warrant condemnation." (The Thompson, 3 Wall, 155, Locke v. United States, 7 Cranch 337).

In the case of Schnorenberg v. United States (7th Cir.) 23 F. (2d) 38, 39 the rule is stated:

> "But it is not true that the search of 'any other building or property' can only be made under a search warrant. The Courts have repeatedly held that such searches, without warrant, are valid, if made upon reasonable or probable cause."

The agents here had probable cause. It appears that they left the ranch premises, *and on adjoining lands* found two still sites, certain stills, mash and other implements designed for the manufacture of liquor. It is conceded that they were not trespassing when they discovered the stills, and as was said in McGuire v. United States, 273 U. S. 95, at 99:

> "Even if the officers were liable as trespassers ab initio, which we do not decide, we are concerned here not with their liability but with the interest of the Government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth amendments."

The agents upon finding the stills had discovered an unlawful enterprise; two still houses, mash in the process of fermentation, three stills and other materials and equipment designed for the unlawful manufacture of large quantities of intoxicating liquor.

> *"The capacity of the stills discovered would indicate a large product, and the officer might reasonably infer that this product was stored somewhere."* (Italics ours.)
>
> (Schnorenberg v. United States, Supra., at p. 40).

The agents saw mule and cart tracks leading from the still to the ranch buildings, the tractor near the buildings with wheels which would make tracks similar to those observed at the still sites, the mules in the barn, and the cart in the yard.

In addition it is not contradicted that two vats were found by the barn constructed "along the same line and made of the same kind of lumber as the agents found at the two still houses. (Tr. 35, 55). The agents said they were new and had just been constructed while the defendants said they were water tanks (Tr. 83) and on the premises when these defendants came there. (Tr. 88.) These vats, similar to those at the still sites being found on the premises, would be additional evidence to give the officers reasonable and probable cause to search the premises.

The probative value of tracks leading to a supply of liquor is recognized in Gentili v. United States (9th Cir.), 22 F. (2d) 67. There the evidence was:

> "Upon a search the officers discovered no liquor, but in the kitchen some empty bottles and whisky flasks, and on the table whisky glasses. Finding the door to room No. 15 locked, they obtained from defendant the key. Upon opening the door, the room appeared to be unoccupied, and was "dusty and dirty." Visible on the dusty floor were *"well-worn paths"* leading to a window facing upon what is referred to as an alcove. Raising the shade and the window, they observed that the window sill was *"worn and scarred."* Passing through the window, they followed a *similar path* on a roof connecting the Tripoli Hotel with an adjoining building, 12 feet away, known as the Alaska Hotel, and operated by a Mrs. Harris. Opening this window they kept it up by inserting in a hole in the sash appropriate for the purpose, a nail which they found lying on the sill. Entering a room through this window, they observed a similar path or trail leading to a closet

door, which was locked. Upon opening the door they found in the closet approximately 4½ gallons of distilled spirits and 27 bottles of beer. The door from the room to the corridor of the hotel was closed, a chair having been so placed under the knob that it could not be opened from the outside." (Italics ours.)

Although no liquor was found on the defendant's premises this Court held the above evidence would support conviction for possession of intoxicating liquor and maintaining a nuisance.

Having probable cause to search the ranch premises, the question is presented whether the earth near the chicken house forty or fifty yards from the dwelling comes within the protection of the constitutional restriction against searches and seizures.

The Supreme Court has said:

"The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226. (Hester v. United States 265 U. S. 57.)

In Dulek v. United States, 16 F. (2d) 275, the Circuit Court of Appeals of the Sixth Circuit decided that a cabin containing a still and its appurtenances, concealed in a wooded swamp on accused's 40-acre farm, 230 feet from his dwelling, was not part of the curtilage, and that it was not within the protection of the constitutional restriction against search and seizure, citing Hester v. United States, supra.

In Schnoreberg v. United States (supra.) the Court said:

> *"The chicken coop on the farm of Herman and the barn on that of Jacob were buildings other than their private dwellings, and the statute left the way open for searching each of these places without a warrant, if the search was made without malice and upon probable cause."* (Italics ours.)

In view of the foregoing we submit that appellants' objection to the legality of the search is without merit.

Consent to Search

As to consent to the search, appellants correctly state on page 1 of their brief "There is a dispute as to whether or not the defendants Graves and Doran told the officer to go ahead and make the search. Some of the officers say that they were given permission. The defendants say not. But there is no evidence in the case that Morrison authorized the search, or authorized the two men working for him or any one else, to give that permission."

The record does not disclose whether the Court denied the motion to suppress herein on the the theory that defendants had consented to the search and hence could not object or upon the theory that the constitutional restriction against searches did not apply to the place where the liquor was found. The protection against searches and seizures may be waived by consent, and a hired man left in charge of a ranch can properly give permission to the officers to search. (Raine v. United States (9th Cir) 299 Fed. 407, 411) (certiorari denied 266 U. S. 611).

The evidence indicates that consent was given, the agents so testified (Tr. 35, 62) and while Graves denied it (Tr. 75) Doran said when asked if the agents requested permission to make a search, "Not that I know of." (Tr. 91). And Mrs. Doran, the lady present at the house when the officers came said, "I don't recall." (Tr. 98). Although all three were present when the officers requested permission (Tr. 75). The Court denied the motion to suppress. In Baldwin v. United States, (5 F. (2d) 133, 134) it is said:

> "According to some authorities, his finding upon a preliminary question of admissibility is conclusive and will not be reviewed; *but, in any event, his finding carries the same weight as the finding of a jury upon a disputed issue of fact and will not be disturbed by a reviewing court unless the error is manifest.*" (Italics ours.)

And in Schutte v. United States (6th Cir.) 21 F. (2d) 830, the court said:

> "In the search of a dwelling made by consent, no search warrant is necessary. Gatterdam v. U. S., C. C. A. 6, 5 F. (2d) 673, 674. As to whether such consent was freely given, there was a question of fact. The Court found as a fact that consent was given and without any duress; this conclusion was amply supported by the evidence; no question of law thereon remains for review."

The Evidence is Sufficient

There is substantial evidence to support the verdict of the jury in finding the defendants guilty.

> "In considering the question whether there has been error in refusing a directed verdict for the defendant on a criminal trial, this court can inquire only whether there was any evidence to sustain the verdict."
>
> Cohen v. United States (9th Cir.) 214 Fed. 23, 27.

And in Fitzgerald v. United States (6th Cir.) 29 F. (2d.) 881 the rule is stated that; "In considering the motion for a directed verdict, we must take that view of the evidence most favorable to the appellee".

The evidence shows that the defendant Morrison has owned or in possession of the place since 1927 (Tr. 36); that he came out there several times a week (Tr. 84, 96) and would stay a day or over night and help with "all the work around there" (Tr. 96); that the defendants Doran and Graves had worked on or about the ranch for two months or more (Tr. 72, 87); that there was mash and stills at still sites near the ranch, whiskey buried near the chicken house on the ranch premises (Tr. 35, 45), tracks from the ranch premises to the still sites (Tr. 36), which lead no further (Tr. 44) made by mules, a tractor and a cart found on the ranch (Tr. 37). The defendants admitted they were using the mules and the tractor (Tr. 84, 89) and the testimony does not even suggest that anyone else used them. There is no evidence that other people were on or about the ranch premises, and defendant Doran said, *he, Graves and Morrison were the only men there* (Tr. 96). The defendants Doran and Graves merely denied any knowledge of the still sites or liquor (Tr. 74, 88, 89), *although the location of one of the still sites could be seen from*

the barn on the ranch premises (Tr. 81). It affirmatively was shown that the nearest house was from two to four miles away and it was not shown that anyone lived there (Tr. 49, 69).

The Court in Pleich v. United States (9th Cir.) 20 F. (2d) 383, 384) said:

> "It is true that the evidence showed no actual sale or possession by Pleich; but as it appeared that he was the sole lessee and proprietor of the resort, *and worked therein every day,* and that liquor was kept for sale on the premises, *the jury was fully justified in concluding that he must have known that liquor was kept and sold by his employees.*"

The case of Parks v. United States (4th Cir.) 297 Fed. 834, would seem conclusive of the case at bar. Therein it was held, quoting from the syllabus:

> "In a prosecution for unlawful possession of liquor, defendant's guilt may be inferred from the finding of liquor in an unusual place of concealment on his premises, though the only direct testimony was to the effect that he had no knowledge of it."

Alse see Gentili v. United States (9th Cir.) 22 F. (2d) 67, heretofore cited herein.

The testimony of defendants is interesting and significant. Thus Graves testified that prior to going out on the ranch he had been working around pool halls and picking up odd jobs and that since the time of his arrest he had worked about a week and four days (Tr. 76, 77).

And Doran testified that he had worked for farmers

"lots of times" but when questioned further said "two or three years ago." (Tr. 92.)

Yet these two defendants were employed, Doran and his wife at $125.00 per month, so he states (Tr. 93) and Graves at $75.00 per month. (Tr. 81.)

They were on the ranch two months. Graves testified on cross-examination.

Q. Now, you know where this still was found up there, don't you? (Indicating on plat.)

A. I saw the smoke where they burned them.

Q. Well, you knew where that place is located?

A. Yes, sir; I do.

Q. You can see that from the barn, can't you, or not?

A. *You could see the location, but you could not seen any buildings or anything.*

Q. *Yes, you could see the location where it was?*

A. *I know just about where it was."* (Tr. 81.)

* * * * * * * * * * * *

Q. Now, did you ever notice when you went out this road that leads to the ranch-house, a trail turning off up toward that still?

A. No, sir; *I was never out there,* only about twice.

* * * * * * * * * * * *

Q. I ask you if you saw any trail leading down

to that still-house? Were you ever down to that still-house?

A. *No, sir.*

Q. That is just across the fence, isn't it; the south fence of the Morrison place?

A. Why, I guess it is outside the fence.

Q. And there is a gate that goes through there somewhere, isn't there?

A. Not as I know of.

Q. Never saw a gate down there?

A. No, sir.

Q. Is there a gate over here, down in this part, along this fence to the east, this edge here, to the eastern part?

A. Yes, sir; there is a gate down there.

Q. And you have gone through that gate?

A. Yes, sir.

Q. And doesn't that lead you down to this still site, the trail?

A. I never saw the trail." (Tr. 82, 83.)

Doran said on cross-examination:

"Q. Did you ever see a trail leading from that road—from this road to the still-house up here at the top?

A. No, sir.

Q. *You never saw that trail at all?*

A. *No, sir.*

Q. Were you ever up at the still-house?
A. No, sir.

Q. You worked right up here, did you not?
A. Over here. (Indicating on plat.)

Q. Did you ever see the trail leading from the gate over here on this side, angling down through here to the still-house at the south?
A. No, sir.

Q. Never saw that?
A. No, sir.'' (Tr. 95, 96.)

The jury were instructed that if the defendants had knowledge of the liquor being on the premises they could be found guilty. Counsel for appellants finds no quarrel with the instruction but states there was no evidence to establish that they had knowledge.

The case is not unlike Swenzel v. United States (2nd Cir.) 22 F. (2) 280) wherein the court said:

> ''There seems every reason to believe that Swenzel testified falsely about the ownership of this shirt, and also about his ignorance of what was going on in a place next to his residence, where a brewery was being installed and trucks were coming and going. He was unable to identify any other persons connected with the enterprise, and he and the defendant Bindel with another defendant Schwertz, against whom the information was dismissed, *were the only persons identified who were about these premises.*'' (Italics ours.)

The language of the Court in the case of United States vs. Houghton, 14 Fed. 544 at page 547, is pertinent:

> "There is great misapprehension in the popular mind on this subject. There seems to be a prevalent notion that no one is chargeable with more knowledge than he chooses to have; *that he is permitted to close his eyes, when he pleases, upon all sources of information,* and then excuse his ignorance by saying that he does not see anything. In criminal as well as civil affairs every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry." (Italics ours.)

There is other significant evidence which was no doubt considered by the jury. The testimony that the defendants Graves and Doran were working on the ranch at a cost of $200 per month to Morrison; a ranch which Denny said had ten acres plowed (Tr. 39, 40), the surveyor said had 60 acres in alfalfa, (Tr. 70) Doran said had about 100 acres in hay (Tr. 95); on which there were 30 or 35 cattle (Tr. 80), two pigs (Tr. 93), two milch cows, six horses and a team of mules (Tr. 94); and the testimony that they had spent 'a couple of weeks' installing a water wheel (Tr. 94), and testified at length as to fixing certain water pipes (Tr. 78, 89, 94) wherein among other things it was stated that about 400 yards of the pipe was underground and had to be dug up, while the surveyor, testifying for defendants, said he could testify as to the position of the water pipes from an examination made shortly after the date of the offense charged because "*grass was grown all*

over them.'' (Tr. 69.)

In view of these and the other circumstances surrounding the presence of the defendants on the ranch, their professed ignorance of the existence of the still near the ranch or the liquor on the premises, coupled with their admission that they were the only ones on the premises, and the lack of any evidence from which it could even be inferred that third persons had been or were about the premises, we submit there is substantial evidence to support the verdict of the jury.

In Donegan v. United States 296 Fed. 843 at 849 the Court said:

> ''Incriminating evidence is strengthened by a failure to adduce rebutting evidence tending to prove that the state of facts disclosed is consistent with innocence, when it properly may be inferred that exculpatory evidence would be forthcoming if there were an absence of guilt. United States ex rel. Bilokumsky v. Tod (Nov. 12, 1923), 263 U. S. 149, 44 Sup. Ct. 54, 68 L. Ed.....''

For the foregoing reasons, we respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

WELLINGTON D. RANKIN,
United States Attorney,

ARTHUR P. ACHER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 5624

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN VERNON QUARLES and HOPE VIRGINIA FINN,

Appellants,

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a corporation,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN VERNON QUARLES and HOPE VIRGINIA FINN,

Appellants,

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a corporation,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

RICHARDS & HAGA
Boise, Idaho
Attorneys for Appellants

JONES, POMEROY & JONES
Pocatello, Idaho
E. H. CASTERLIN
Salmon, Idaho
Attorneys for Appellee

INDEX

	Page
Additional Assignment of Errors	110
Answer	24
Assignment of Errors	108
Bond on Appeal	111
Certificate of Clerk	118
Citation	114
Complaint as Amended	7
Decree of Dismissal	106
Memorandum Decision	95
Names and Addresses Attorneys of Record	4
Order Allowing Appeal	108
Petition for Appeal	107
Praecipe	116
Statement of Evidence	45

INDEX TO STATEMENT OF EVIDENCE

Witnesses on behalf of plaintiffs:

		Page
Rose Loring Quarles,	Direct	45
	Cross	48
G. B. Quarles	Direct	49, 85
	Cross	53
John Vernon Quarles	Direct	58
H. G. King	Direct	60, 77
	Cross	62, 81
	Redirect	63
	Recross	63
W. W. Simmonds	Direct	63
T. J. Stroud	Direct	67
	Cross	67
	Redirect	69, 70, 72
	Recross	69, 71
W. C. Smith	Direct	73, 83
	Cross	74, 84
J. Z. Moore	Direct	74
	Cross	75
Louis F. Ramey	Direct	76
	Cross	77
	Redirect	77
	Recross	77

Order Settling Statement of Evidence 94

Plaintiffs' Exhibit K—Letter 5-20-22 88

Plaintiffs' Exhibit M—Letter 5-24-22 90

Plaintiffs' Exhibit N—Letter 6-7-22 90

Stipulation for Settlement of Statement 93

In the District Court of the United States for the District of Idaho, Eastern Division

---

JOHN VERNON QUARLES and HOPE VIRGINIA FINN,

Plaintiffs,

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a corporation,

Defendant.

No. 628

In Equity

COMPLAINT AS AMENDED

To the Honorable, the Judge of the District Court of the United States, for the District of Idaho, Eastern Division:

John Vernon Quarles and Hope Virginia Finn, citizens of the State of California, residing at Lankershim, Los Angeles County, in said State, bring this their bill of complaint against The Citizens National Bank of Salmon, Idaho, a corporation organized under the National Bank Act of the United States and engaged in the business of banking in Salmon, Lemhi County, Idaho, and respectfully show unto this Honorable Court:

I.

That the plaintiffs John Vernon Quarles and Hope Virginia Finn (formerly Hope Virginia

Quarles) are citizens and residents of the State of California, residing in Los Angeles County, said State, and that the said John Vernon Quarles is now over the age of twenty-one years and the said Hope Virginia Finn, whose maiden name was Hope Virginia Quarles, is now over the age of eighteen years.

II.

That the defendant The Citizens National Bank of Salmon, Idaho, now is and during all the times hereinafter mentioned was a corporation organized under the National Bank Act of the United States, with its principal place of business at Salmon, Lemhi County, Idaho.

III.

That this is a suit of a civil nature, in equity, and is wholly between citizens of different States, and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

IV.

That on and for some time prior to the 31st day of May, 1922, one G. B. Quarles was indebted to the plaintiffs herein, who were then minors under the ages of 21 and 18 years, respectively, in an amount of about $4,490.88; that for the purpose of protecting the said plaintiffs in their property rights, the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi

County, on or about the 31st day of May, 1922, and for the purpose of prosecuting an action in favor of the said plaintiffs and against the said G. B. Quarles, appointed one H. L. McCaleb, as the guardian ad litem for said plaintiffs in said action and proceeding; that such proceedings were had in such action so prosecuted on behalf of said plaintiffs by the said H. L. McCaleb in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, against the said G. B. Quarles, that judgment was thereupon duly entered by said Court in favor of the said plaintiffs and their said guardian ad litem and against the said G. B. Quarles for the sum of $4,490.88.

V.

That thereafter and on or about the 1st day of June, 1922, the said G. B. Quarles, being unable to pay and discharge said judgment, but desiring to avoid execution being taken out thereon at said time and desiring also to secure the payment thereof, made, executed and delivered to the said H. L. McCaleb as guardian ad litem for the said plaintiffs and for the benefit and protection of said plaintiffs, a certain mortgage covering, among other things, that certain building known as the "Wool Warehouse" and located on the right of way of the Gilmore and Pittsburgh Railroad Company south of the track of said Company, and westerly from the Depot of said Company in Salmon, Idaho,

and about ten hundred feet distant from said depot, said wool warehouse being a frame structure, sides and roof of iron and on a concrete foundation, a copy of said mortgage, marked Exhibit "A", is hereto attached and hereby referred to for a full, true and correct statement of the terms and conditions thereof, and plaintiffs pray that the same may be taken and considered with the same force and effect as if the same were here set out at large. That said mortgage was duly acknowledged and sworn to as required by the laws of the State of Idaho governing mortgages on personal property and the same was filed for record in the office of the County Recorder of said Lemhi County on the 1st day of June, 1922, at 20 minutes past 3 o'clock P. M. and a memorandum or record thereof was made in Book E of Chattel Mortgages at page 83 of the records of said office, as required by the laws of the State of Idaho.

VI.

That thereafter and about the month of September, 1922, the said H. L. McCaleb, acting in the interest of the plaintiffs, but without their knowledge or consent, foreclosed the said mortgage under Sections 6380, 6381, 6382, 6383 and 6384 of the Compiled Statutes of Idaho; that in connection with such foreclosure, the sheriff obtained peaceable possession of said wool warehouse and after giving notice of sale as required by the Statutes above re-

ferred to, the Sheriff of said Lemhi County, Idaho, sold said wool warehouse on or about September 30, 1922, at public sale to these plaintiffs, who were represented in said matter by Rose Loring Quarles, for the sum of $25.00, and delivered to her a bill of sale therefor as required by Section 6383 of the Compiled Statutes of Idaho, and made his return of sale as required by Section 6384 of said Statutes, and thereupon the said Rose Loring Quarles on behalf of these plaintiffs took possession of said wool warehouse; that said Rose Loring Quarles bid said property in and purchased the same in the interest of and for the use and benefit of these plaintiffs and for the purpose of protecting the property rights of these plaintiffs, who then and for a long time thereafter were minors as aforesaid under the ages of 21 years and 18 years respectively; that the said Rose Loring Quarles, prior to the commencement of this suit, has duly assigned, transferred and set over to the plaintiffs herein all right, title and interest acquired by her under the said sale in and to said wool warehouse and all rights to an accounting from the said defendant for the use and occupation of said wool warehouse and for the reasonable rental value thereof; that the plaintiffs herein have acquired and now hold all right, title and interest to said wool warehouse acquired by said Rose Loring Quarles and all right to receive and demand from the said defendant a full and complete accounting for the use and occupation of said wool

warehouse by the said defendant as hereinafter alleged and all right to demand and receive from said defendant all rentals, dues and damages of whatsoever kind due and owing from the said defendant to said Rose Loring Quarles, and the said G. B. Quarles has likewise transferred and assigned to these plaintiffs, prior to the commencement of this suit, whatever claim or demand he might have against the said defendant on account of the wrongful taking possession of said wool warehouse and withholding the possession thereof as hereinafter alleged from these plaintiffs and from the said Rose Loring Quarles, as well as from the said G. B. Quarles.

VII.

That on or about the 15th day of April, 1922, the said defendant The Citizens National Bank of Salmon commenced an action against the said G. B. Quarles in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, and on or about the 17th day of April, 1922, the Sheriff of said Lemhi County pretended to levy a writ of attachment which had been issued in said cause, on the said wool warehouse, said wool warehouse being personal property situated on the railroad right of way, and the said Sheriff pretended to appoint a custodian to take possession of said property, but neither the said Sheriff nor the said custodian at any time took possession or con-

trol of said wool warehouse, but the said wool warehouse at the time of said pretended attachment was and for upwards of five months thereafter continued to be and remain in the possession of the said G. B. Quarles, who used the same in his business and collected all the rents and income therefrom and applied the same to his own use, and at no time did the Sheriff, or his deputy or custodian, in said action or under said writ of attachment, take possession or control of said wool warehouse; that said attachment was, under the laws of the State of Idaho, wholly void and ineffectual and no lien, right or interest whatsoever was acquired on or in said wool warehouse by said Citizens National Bank of Salmon by or under said pretended attachment.

VIII.

That thereafter and on or about the 2nd day of October, 1922, the said District Court entered judgment in said action in favor of the said Citizens National Bank of Salmon and against the said G. B. Quarles for an amount of upwards of $5,000.00.

IX.

That thereafter and on or about the 16th day of October, 1922, the said G. B. Quarles was, by the District Court of the United States, for the District of Idaho, Eastern Division, adjudged and declared a bankrupt; that thereafter one Allen C. Merritt,

of Salmon, Idaho, was duly elected and appointed Trustee in bankruptcy and such bankruptcy proceedings were thereafter concluded and such proceedings had therein that on or about the 28th day of February, 1924, the said G. B. Quarles received his discharge in bankruptcy.

X.

That the judgment hereinbefore referred to so obtained by the defendant The Citizens National Bank of Salmon against the said G. B. Quarles was duly listed by the said G. B. Quarles in said bankruptcy proceedings in his schedule of liabilities, but the said wool warehouse having been sold as aforesaid prior to said bankruptcy proceedings, was not listed as part of the assets of said G. B. Quarles and no claim to said wool warehouse was made by the said Trustee in bankruptcy.

XI.

That on or about the 15th day of January, 1923, the said defendant, The Citizens National Bank of Salmon, caused a writ of execution to be issued under its said judgment against said G. B. Quarles and placed the same in the hands of the Sheriff of said Lemhi County and caused the said Sheriff to pretend to levy said writ of execution on said wool warehouse, notwithstanding said G. B. Quarles had been adjudged a bankrupt long prior to the issuance of said writ of execution and notwithstanding said wool warehouse had been sold on or about Septem-

ber 30, 1922, a as aforesaid to these plaintiffs; that said defendant caused said wool warehouse to be sold under its writ of execution issued as aforesaid, and the Sheriff of said Lemhi County pretended to sell said wool warehouse on or about the 12th day of February, 1923, to the said defendant Citizens National Bank under said writ of execution, for the sum of $25.00; that said sale or pretended sale was, as these plaintiffs are informed and believe and so allege the fact to be, absolutely void and ineffectual and did not vest in or transfer to the said defendant any right, title or interest whatsoever in or to said wool warehouse, or any part thereof, but notwithstanding said void and ineffectual sale, the said defendant wrongfully and without right, took possession of said wool warehouse on or about the 12th day of February, 1923, and ever since said date has wrongfully and without right held the possession thereof and deprived these plaintiffs and the said Rose Loring Quarles of the possession, use and enjoyment thereof and of the rentals and income therefrom.

XII.

That the said defendant, as plaintiffs are informed and believe and so allege the fact to be, has annually collected large sums, to-wit: Upwards of $1,000.00 per year, for storage, rentals and other uses of said wool warehouse, and has applied such moneys so collected to its own use and benefit, all

of which was most prejudicial to the rights of these plaintiffs, who were minors as aforesaid.

XIII.

That the reasonable rental value of the said wool warehouse was, during the years 1923, 1924 and 1925, and is during the year 1926, the sum of $1,000.00 per year; that the said defendant has, as aforesaid, wrongfully and without right held possession of said wool warehouse and applied to its own use and benefit the earnings, rents, income and profits thereof, to which the said plaintiffs were entitled, and said defendant has deprived these plaintiffs of the possession, use and enjoyment of said wool warehouse ever since on or about the 12th day of February, 1923.

XIV.

That plaintiffs are without adequate remedy in the premises and only in a suit of this nature can the questions herein involved be adequately determined and justice done these plaintiffs.

XV.

For a second cause of action, plaintiffs allege and show:

(a) They adopt and make a part of this cause of action as fully and with the same force and effect as if here set out in full, paragraphs numbered I, II, III, IV, V, VII, VIII, all that part of paragraph

XI to and including the figures "$25.00" and XIV of the first cause of action.

(b) That plaintiffs are now the owners of the said mortgage (Exhibit "A") from G. B. Quarles to the said H. L. McCaleb, dated June 1, 1922; that the indebtedness secured by said mortgage has not, nor has any part thereof, been paid to these plaintiffs or to anyone for them; that said mortgage is a first and prior lien upon the said wool warehouse; that the indebtedness secured thereby is long past due and there is now due and owing to these plaintiffs the principal amount set out in said mortgage, to-wit: The sum of $4,490.88 and interest thereon at the rate of seven per cent. per annum from June 1, 1922, and these plaintiffs have elected and hereby do elect to foreclose said mortgage against the said wool warehouse.

IN CONSIDERATION WHEREOF, plaintiffs pray this Honorable Court as follows:

1. That it may be adjudged and decreed that the attachment or pretended attachment of said premises by the defendant, The Citizens National Bank, about the month of April, 1922, was void and ineffectual and did not create any lien whatsoever on or against the said wool warehouse.

2. That it may be adjudged and decreed that the mortgage from the said G. B. Quarles to the said H. L. McCaleb as guardian ad litem of these

plaintiffs and dated on or about the 1st day of June, 1922, was a first and prior lien on and against said wool warehouse and that the sale of said premises on the foreclosure of said mortgage, on or about the 30th day of September, 1922, vested in and transferred to the said Rose Loring Quarles a good and valid title to said wool warehouse.

3. That it may be adjudged and decreed that the pretended sale of said wool warehouse on or about the 12th day of February, 1923, to the defendant The Citizens National Bank of Salmon under its writ of execution was void and ineffectual and transferred no right, title or interest whatsoever to the said The Citizens National Bank in said wool warehouse.

4. That it may be adjudged and decreed that the possession of said defendant, The Citizens National Bank of Salmon, of said wool warehouse since the 12th day of February, 1923, has been wrongful and without right and that the said defendant has wrongfully and without right deprived the said plaintiffs and the said Rose Loring Quarles of the use and enjoyment of said premises during all of said period, to-wit: From the 12th day of February, 1923.

5. That an accounting may be had of the rents, income and profits of said wool warehouse which the said defendant has applied to its own use and benefit and that said defendant be required to ac-

count to the plaintiffs herein for all of said rents, income and profits and for the reasonable rental value of said wool warehouse.

6. That the said plaintiffs may be adjudged and decreed to be the owners of said wool warehouse and of the whole thereof, and that the defendant be ordered and directed to deliver the possession thereof to the said plaintiffs.

7. That the plaintiffs may have judgment against the said defendant for the amount found due upon the said accounting and for the reasonable rental value of said wool warehouse, to-wit: at the rate of $1,000.00 per year from the 12th day of February, 1923, to date of judgment herein.

8. That in the event the Court should for any reason find that the said mortgage has not been legally foreclosed, that plaintiffs may then have a decree for the foreclosure of said mortgage and sale of said premises.

9. That plaintiffs may recover their costs herein and have such other relief as may be just and equitable.

RICHARDS & HAGA
OLIVER O. HAGA
Solicitors for Plaintiffs
Residence: Boise, Idaho

(Duly Verified)

EXHIBIT "A"

THIS MORTGAGE, Made this 1st day of June, 1922, by G. B. Quarles of Salmon, County of Lemhi, State of Idaho, the mortgagor, to H. L. McCaleb of Dillon, County of Beaverhead, State of Montana, the mortgagee,

WITNESSETH: That the said mortgagor hereby mortgages to said Mortgagee all of those certain goods and chattels now being in Lemhi County, State of Idaho, and described as follows:

That certain building known as the Wool Warehouse located on the right of way of the Gilmore and Pittsburgh Railroad Company, South of the track of said Company, and Westerly from the depot of said Company in Salmon, Idaho, about feen hundred feet distant from said depot. Said wool warehouse being of frame structure, sides and roof of iron and concrete foundation, also one seven passenger, six cylinder Studebaker touring automobile Serial number 6 15-688.

to secure the payment of Forty-four hundred ninety and 88/100 Dollars, according to the terms and conditions of a judgment against the mortgagor in favor of the mortgagee as guardian ad litem of John V. Quarles and Hope Virginia Quarles, rendered in the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Lemhi,

May 31st, 1922. This mortgage is given and accepted as additional security to any security which may exist in favor of the mortgagee by way of said judgment being a lien upon any real property of the said mortgagor and this mortgage does not in any way waive any such other lien upon any real property which said judgment may be a lien nor does this mortgage waive the right of the judgment creditor of the said G. B. Quarles to share in the proceeds of the sale of any attached property, attached in the suit of the Citizens National Bank against the said G. B. Quarles.

It is also agreed that if the mortgagor shall fail to make any payment as in said judgment provided, then at the option of said mortgagee, his executors, administrators, or assigns, the said judgment shall immediately become due and payable and said mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds to pay the whole amount in said note specified and all costs of any action or sale including three hundred dollars, as counsel fees, paying the surplus to the said mortgagor.

IN WITNESS WHEREOF, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

Signed, Sealed and Delivered

in the Presence of G. B. QUARLES (Seal)

State of Idaho)
)ss.
County of Lemhi)

G. B. Quarles the mortgagor in the foregoing mortgage named deposes and says that the foregoing mortgage is made in good faith and without any design to hinder, delay or defraud creditor or creditors.

G. B. QUARLES

Subscribed and sworn to
before me this 1st day of
June, 1922.

Allen C. Merrit

(SEAL)

STATE OF IDAHO)
)ss.
COUNTY OF LEMHI)

On this first day of June in the year 1922, before me, Allen C. Merritt, a Notary Public in and for said State, personally appeared G. B. Quarles, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Allen C. Merritt

Notary Public Residing at
Salmon, Idaho

(SEAL)

Instrument No. 26428

State of Idaho)
)ss.
County of Lemhi)

I hereby certify that this instrument was filed for record at the request of H. L. McCaleb at 20 minutes past 3 o'clock P. M., this 1st day of June, A. D. 1922, in my office and duly recorded in Book E of Chattel Mortgages at page 83.

W. W. Simmonds, Ex-officio
Recorder by Delia M. Glennon,
Deputy

Fees $.50 paid.

Endorsed: Filed July 7, 1926.
W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

ANSWER

Comes now the defendant, above named, and in answer to the Bill of Complaint on file in the above entitled action, admits, denies and alleges as follows:

I.

Admits Paragraphs I, II, and III.

II.

Answering Paragraph IV, this defendant is without information, knowledge or belief sufficient to enable it to answer whether said G. B. Quarles on and for some time prior to the 31st day of May, 1922, or at all, was indebted to the plaintiffs herein in the sum of about $4,490.88, or any amount whatsoever, and basing its answer on that ground denies the same.

Further answering said paragraph, this defendant admits that one H. L. McCaleb was on or about the 31st day of May, 1922, appointed guardian ad litem for said plaintiffs by the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, for the purpose of prosecuting an action in favor of the plaintiffs herein against said G. B. Quarles, and admits that such proceedings were had in said action in said Court, and that judgment was entered by said Court in favor of the plaintiffs and guardian ad litem, and against G. B. Quarles in the sum of $4,490.88, but

this defendant is without knowledge, information or belief as to whether said action was instituted for the purpose of protecting the said plaintiffs in their property rights, and upon that ground denies the same, but alleges on information and belief that said guardian was appointed and said action prosecuted and said judgment obtained for the purpose of hindering, delaying and defrauding the creditors of said G. B. Quarles.

III.

Answering Paragraph V, this defendant denies that the said G. B. Quarles made, executed and/or delivered to H. L. McCaleb, as guardian ad litem, the mortgage mentioned and set forth in said paragraph, but admits that on or about June 1, 1922, said G. B. Quarles made, executed and delivered to H. L. McCaleb, in his individual capacity, a mortgage whereby he pretended to mortgage the property mentioned and described in Paragraph V of said Bill of Complaint, and that the same was filed for record in the Office of the County Recorder of Lemhi County, as alleged in said paragraph.

Admits that G. B. Quarles was unable to pay and discharge said judgment, but defendant is without absolute knowledge as to whether the said mortgage was executed to avoid execution being taken out thereon and to secure the payment of said judgment and for the protection of plaintiffs, but defendant is informed and believes and on that ground alleges that the said mortgage so given to

H. L. McCaleb in his individual capacity, as aforesaid, was made and given for the purpose of hindering, delaying and defrauding the creditors of the said G. B. Quarles, and denies each and every other allegation in said paragraph not otherwise admitted or qualified.

IV.

Answering Paragraph VI, this defendant admits that in the month of September, 1922, the said H. L. McCaleb attempted to foreclose said mortgage so given to him in his individual capacity, but denies that he foreclosed said mortgage in compliance with or under Sections 6380, 6381, 6382, 6383 and 6384, of the Compiled Statutes of Idaho; and further denies that in connection with such foreclosure the Sheriff obtained peaceable possession of said wool warehouse under said foreclosure proceedings, or that he gave notice of the sale thereof as required by the Statutes above referred to; this defendant has no knowledge, information or belief sufficient to answer whether in such alleged foreclosure H. L. McCaleb was acting in the interests of the plaintiffs and without their knowledge and consent, and upon that ground denies the same.

Further answering said paragraph, this defendant says it has no knowledge or belief sufficient to enable it to answer whether the Sheriff of Lemhi County sold said wool warehouse or attempted to sell the same on or about September 30, 1922, as in

said Bill of Complaint alleged, at public sale to Rose Loring Quarles, for the sum of $25.00, or any sum, or delivered or attempted to deliver her a Bill of Sale therefor as required by Section 6383 of the Compiled Statutes of Idaho, and placing its denial on that ground denies the same; and denies that the said Sheriff made his return of said alleged sale as required by Section 6384 of said Statutes, and denies that thereupon, or at all, the said Rose Loring Quarles took possession of said wool warehouse, and denies that said Rose Loring Quarles bid said property in and purchased the same in the interest of and for the use and benefit of these plaintiffs and/or for the purpose of protecting the property rights of these plaintiffs.

Further answering said paragraph, this defendant says it has no knowledge, information or belief sufficient to answer whether prior to the commencement of this suit, said Rose Loring Quarles has duly or at all assigned, transferred and set over to the plaintiffs all right, title and interest acquired by her under said alleged sale in and to said wool warehouse, and/or all rights to an accounting from the said defendant to the use and/or occupation of said wool warehouse, and/or for the reasonable rental value thereof, or that plaintiffs herein have acquired and now hold all the alleged right, title and interest to said wool warehouse alleged to have been acquired by said Rose Loring Quarles, and

placing its denial on that ground denies the same; and this defendant denies that the plaintiffs herein have any or all right to receive and/or demand from the said defendant a full and/or complete accounting for the use and occupation of said wool warehouse, by the said defendant, as alleged in said Bill of Complaint, and/or all right to demand and/or to receive from said defendant all rentals, dues or damages of whatsoever kind alleged to be due and owing from said defendant to said Rose Loring Quarles, and denies that the plaintiffs or Rose Loring Quarles have any right to demand or receive from the defendant any rentals, dues or damages whatsoever, and that this defendant is without knowledge sufficient to answer whether the said G. B. Quarles has likewise, or at all, transferred and/or assigned to these plaintiffs prior to the commencement of this suit, whatsoever claim or demand he might have against said defendant on account of the alleged wrongful taking possession of said wool warehouse, and/or withholding the possession thereof as alleged in said Bill of Complaint from these plaintiffs, and/or from the said Rose Loring Quarles, as well as from said G. B. Quarles, and placing its denial on that ground denies the same.

Further answering said paragraph, this defendant alleges that if any attempted sale were made to Rose Loring Quarles of said wool warehouse, as alleged in said Bill of Complaint, or otherwise, that

the said Rose Loring Quarles did not acquire or obtain any title therein by virtue thereof, and that said alleged sale was wholly void.

V.

Answering Paragraph VII, this defendant admits that on or about April 15, 1922, the defendant, The Citizens National Bank of Salmon, Idaho, commenced an action against the said G. B. Quarles in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, and admits that on or about the 17th day of April, 1922, a Writ of Attachment was issued in said cause and placed in the hands of the Sheriff of Lemhi County for service, but denies that on or about said time, or at all, the said Sheriff pretended to levy said Writ on the said wool warehouse, being personal property situated on the railroad right of way, but alleges that said Sheriff actually did levy said Writ on said property and took the same into his possession thereunder, and denies that said Sheriff pretended to appoint a custodian to take possession of said property, but alleges that said Sheriff did actually in fact duly appoint a custodian to take possession of said property.

Further answering, this defendant denies that neither the said Sheriff nor the said custodian at any time took possession or control of said wool warehouse and denies that from and after said alleged pretended attachment and for upwards of

five months thereafter, said wool warehouse continued to be or remained in the possession of said G. B. Quarles, who used the same in his business or otherwise.

Further answering said paragraph, this defendant says it is without knowledge, sufficient to answer whether said G. B. Quarles during said time collected any or all rents or incomes therefrom during said time, and/or applied the same to his own use, and placing its denial on that ground denies the same.

Further answering, this defendant denies that the Sheriff or his deputy or custodian did not take possession or control of said wool warehouse under said Writ of Attachment in said action, and denies that said Attachment was under the laws of the State of Idaho, or otherwise, wholly void and/or ineffectual, and denies that no lien, right or interest whatsoever was acquired in said wool warehouse by said Citizens National Bank of Salmon, Idaho, under said attachment, but alleges in this connection that the said Writ of Attachment was duly issued in said cause and placed in the hands of the Sheriff of said Lemhi County, who levied said Writ of Attachment on the said wool warehouse, being the same property that is mentioned and described in said plaintiffs' Bill of Complaint, and the said Sheriff, after taking said property into his possession under said Writ of Attachment, duly and regularly appointed a custodian to take possession of

said property, and that said custodian, so appointed, did take said property into his possession and under his control and held the same as such custodian for said Sheriff under said Attachment as provided by law, and continued to hold and exercise dominion and control over said property until the same was duly sold under execution by the Sheriff to this defendant.

VI.

Answering Paragraph VIII, this defendant admits that on or about the 2nd day of October, 1922, the said District Court entered judgment in said action in favor of The Citizens National Bank of Salmon, Idaho, against the said G. B. Quarles for an amount upwards of $5,000.00.

VII.

Answering Paragraph IX, this defendant admits that on or about the 16th day of October, 1922, the said G. B. Quarles was by the District Court of the United States, for the District of Idaho, Eastern Division, adjudged and declared a bankrupt, but is without knowledge, information or belief sufficient to answer the remaining portion of said paragraph, and placing its denial on that ground denies the same.

VIII.

Answering Paragraph X, this defendant says it has no knowledge, information or belief sufficient

to enable it to answer whether the judgment obtained by The Citizens National Bank of Salmon, Idaho, was duly listed by said G. B. Quarles in said bankrupt proceedings in the schedule of liabilities, or whether said wool warehouse was not listed as a part of the assets of G. B. Quarles, or whether the trustee in bankruptcy made no claim to said wool warehouse, and placing its denial on that ground denies the same.

Further answering said paragraph, this defendant denies that the said wool warehouse was legally sold prior to said bankruptcy proceedings.

IX.

Answering Paragraph XI, this defendant admits that on or about the 15th day of January, 1923, the said defendant, The Citizens National Bank of Salmon, Idaho, caused a Writ of Execution to be issued under its said judgment against said G. B. Quarles, and placed the same in the hands of the Sheriff to pretend to levy said Writ of Execution on said wool warehouse, but alleges that the said Citizens National Bank of Salmon, Idaho, caused said Sheriff to sell said wool warehouse under said Writ, the said property being in the possession of said Sheriff at said time under the attachment proceedings above mentioned; and denies that said wool warehouse had been legally sold to Rose Loring Quarles on September 30, 1922; and alleges that the Writ of Attachment, above mentioned, under

which said Sheriff held said property for said Bank, was issued and levied upon said wool warehouse more than four months prior to the time the said G. B. Quarles was adjudged a bankrupt; and admits said defendant caused said wool warehouse to be sold under its Writ of Execution, which was duly issued and that the Sheriff of said Lemhi County did sell said wool warehouse on the 12th day of February, 1923, to said defendant, Citizens National Bank of Salmon, Idaho, under said Writ of Execution, for the sum of $, but denies that he pretended to sell the same; denies that said sale or alleged pretended sale was absolutely or at all void or ineffectual, and denies that said sale did not vest in or transfer to said defendant any right, title or interest whatsoever in or to said wool warehouse, or any part thereof, but alleges that said sale did transfer the entire interest in said wool warehouse to this defendant, and denies that said sale was ineffectual or void; admits that the defendant took possession of said wool warehouse on or about the 12th day of February, 1923, and ever since said date has held possession thereof, but denies that it wrongfully and without right took possession thereof, or that it wrongfully or without right held the possession thereof; and denies that it has wrongfully deprived these plaintiffs and the said Rose Loring Quarles, or either of them, the possession, use and/or enjoyment thereof and of the rents and income therefrom; and denies that these

plaintiffs or that Rose Loring Quarles were entitled to the use, possession or enjoyment of said property or any rentals or income thereof, since the 12th day of February, 1923.

X.

Answering Paragraph XII, this defendant denies that it has annually collected upwards of $1,000.00 per year, or any sum in excess of $374.00 in the year 1923, $461.00 in the year 1925, and $726.00 in the years 1924 and 1926, for storage rentals and other uses of said wool warehouse, and alleges that it has expended during said time for upkeep, labor, taxes and miscellaneous expenses the sum of $1,055.70, aside from the value of the lease hereinafter mentioned, and further alleges that during the whole of said time said wool warehouse was located upon the right of way of the Gilmore & Pittsburg Railroad, and that this defendant, since about the 12th day of February, 1923, has held a lease from said Railroad for that portion of the right of way upon which said wool warehouse is located, and has had the quiet and peaceful enjoyment of said lease from said Company, and the right to maintain said wool warehouse upon said right of way, without which there could have been no rentals obtained from said wool warehouse, and that said plaintiffs have no interest in and to said lease; denies that it has applied the moneys so collected to its own use and benefit, except first in the

payment of the expenses above mentioned, and in the payment of the reasonable value of the lease above mentioned; denies that in so doing it was prejudicial whatsoever in any manner to the rights of these plaintiffs, and denies that these plaintiffs are entitled to any of said rentals and incomes so collected by this defendant, as above mentioned.

XI.

Answering Paragraph XIII, this defendant denies that the reasonable rental value of said wool warehouse was during the years 1923, 1924 and 1925, and/or during the year 1926, the sum of $1,000.00 per year, or any sum whatsoever, without the lease to that portion of the right of way upon which the same is located, and denies that the reasonable rental value of said wool warehouse, together with said lease is the sum of $1,000.00 per year, or any sum in excess of $250.00; and denies that the said defendant has, as aforesaid, or at all, wrongfully and/or without right held possession of said wool warehouse, or wrongfully or without right applied to its use and benefit the earnings, rents, incomes and/or profits thereof, to which the said plaintiffs are alleged to be entitled, and denies that said defendant has wrongfully deprived these plaintiffs of the possession and use of said wool warehouse ever since on or about the 12th day of February, 1923, or at any time or at all.

XII.

Answering Paragraph XIV, this defendant denies that the plaintiffs are without adequate remedy in the premises and denies that only on a suit of this nature can the questions here involved be adequately determined and/or justice done these plaintiffs.

Further answering said Bill of Complaint, and as a separate and additional defense thereto, this defendant alleges that at the time that the said G. B. Quarles pretended to make, execute and deliver the mortgage to H. L. McCaleb, the mortgage hereinbefore mentioned and described in this answer, copy of which is attached to plaintiffs' Bill of Complaint, the property mentioned and described in said mortgage was in custody of the law under and by virtue of a Writ of Attachment which had been levied against said property in the case of The Citizens National Bank of Salmon, Idaho, against the said G. B. Quarles in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, in this answer hereinbefore referred to, which was well known to the said G. B. Quarles and H. L. McCaleb, and that said mortgage, if valid for any purpose, was subject and subsequent to the lien of said attachment; and this defendant further alleges that said property was so held in the custody of law under and by virtue of said attachment until the same was duly and regularly sold under execution to this defendant, as herein-

before set out in this answer, and that the pretended sale of said property under the powers and terms of said mortgage, as alleged in said Bill of Complaint, was wholly void and ineffectual, and could not convey or transfer the title thereof to any purchaser at said pretended sale, and that by reason thereof the said Rose Loring Quarles or these plaintiffs did not acquire any interest or title in and to said property.

Further answering said complaint and as a separate and additional defense, this defendant alleges that on or about the 15th day of April, 1922, the said defendant, The Citizens National Bank of Salmon, Idaho, commenced an action against the said G. B. Quarles upon a bona fide claim, in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, being the action referred to in the Bill of Complaint, and after the issuance of summons therein a Writ of Attachment was duly issued about the 17th day of April, 1922, in said cause and placed in the hands of the Sheriff of said Lemhi County, for the purpose of levying upon the property of said G. B. Quarles, and that said Sheriff duly levied said Writ of Attachment on the said wool warehouse, being the same property that is mentioned and described in plaintiffs' Bill of Complaint and that the said Sheriff, after taking the said property into his possession under said Writ of Attachment, duly and regularly appointed a custodian to take possession

of said property, and the said custodian, so appointed, did legally take said property into his possession and under his control; and that thereafter, while said property was so held by the said Writ of Attachment in said action, to-wit: On May 29, 1922, the said G. B. Quarles, father of the plaintiffs herein, made his certain note in favor of the plaintiffs for the sum of $4,490.88, bearing interest at 7% per annum, payable on demand, and that two days thereafter, to-wit: May 31, 1922, application was made by the said H. L. McCaleb and G. B. Quarles for the appointment of H. L. McCaleb as guardian ad litem of these plaintiffs for the purpose of instituting suit against the said G. B. Quarles upon said note, and on said day the said H. L. McCaleb was appointed guardian ad litem and filed said action, and on the same day, by the consent of the said G. B. Quarles, judgment was rendered in said last mentioned action in favor of these plaintiffs and their said guardian ad litem against the said G. B. Quarles for the sum of $4,490.88, being the case referred to in plaintiffs' Bill of Complaint; and that on the following day, to-wit: June 1, 1922, the said G. B. Quarles, acting in conjunction with the said H. L. McCaleb, and as the defendant is informed and believes and upon that ground alleges, pretended to make, execute and deliver to the said H. L. McCaleb in his individual capacity a certain mortgage upon the property so attached as aforesaid, for the purported purpose of securing said

judgment, but which was for the purpose of hindering, delaying and defrauding the creditors of said G. B. Quarles and particularly this defendant; and that defendant is further informed and believes and upon that ground alleges that the said parties, for the purpose of further trying to place the property of the said G. B. Quarles beyond the reach of his creditors and particularly this defendant, and while said property was held under said attachment attempted to foreclose said mortgage in order to defeat the creditors of said G. B. Quarles, and in so doing contrived to have Rose Loring Quarles, the wife of G. B. Quarles, to purport to purchase in said property at such purported foreclosure sale; that the defendant further alleges that said pretended foreclosure was void, ineffectual and of no force whatever.

Defendant says it is informed and believes and upon that ground alleges that said pretended mortgage was made by the said G. B. Quarles in contemplation on his part of taking the Act of Bankruptcy; and defendant further alleges, on information and belief, that said mortgage was not made in good faith or for a consideration, and that the affidavit thereto by said G. B. Quarles that it was made in good faith and without any intent to hinder, delay or defraud any creditor or creditors of the said G. B. Quarles, was and is false.

This defendant further alleges, on information and belief, that all the acts hereinbefore enum-

erated on the part of G. B. Quarles and H. L. McCaleb and Rose Loring Quarles, who were relatives of these plaintiffs, as aforesaid, were made collusively and for the purpose on the part of said parties and each of them to hinder, delay and defraud the creditors of said G. B. Quarles and this defendant in particular. That the action so brought by this defendant, upon which said attachment was issued, was based upon a good and valid claim, which claim was thereafter reduced to judgment and which judgment was duly and regularly entered in the records of Lemhi County, State of Idaho, and the property so attached and held under said attachment was duly and regularly sold by execution under the said judgment to this defendant on or about the 9th day of September, 1923, and that this defendant ever since said time was and now is the owner of said property and entitled to the possession thereof and that the plaintiffs have no right, title and interest therein.

Further answering said complaint and as a separate and additional defense, this defendant alleges that on or about the 15th day of April, 1922, the said defendant, The Citizens National Bank of Salmon, Idaho, commenced an action against the said G. B. Quarles upon a bona fide claim, in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, being the action referred to in the Bill of Complaint, and after the issuance of summons therein

a Writ of Attachment was duly issued about the 17th day of April, 1922, in said cause and placed in the hands of the Sheriff of said Lemhi County, for the purpose of levying upon the property of said G. B. Quarles, and that said Sheriff duly levied said Writ of Attachment on the said wool warehouse, being the same property that is mentioned and described in plaintiffs' Bill of Complaint and that the said Sheriff, after taking the said property into his possession under said Writ of Attachment, duly and regularly appointed a custodian to take possession of said property, and the said custodian, so appointed, did legally take said property into his possession and under his control; that thereafter the said G. B. Quarles, defendant in said action, appeared in said action and made a motion to discharge the said wool warehouse property from said attachment on the ground that an excessive amount of property had been attached, in which motion the wool warehouse was particularly mentioned as being worth $4,000.00, and on July 28, 1922, the motion to discharge or release said wool warehouse property from said attachment was denied, and the amount of a release bond was fixed; that the said G. B. Quarles did not in said motion allege or assert or attempt to show at the hearing thereon that there was any defect in said attachment proceedings, and that his motion was entirely based upon the ground that there was an excessive amount of property attached; that on May 29, 1922, said G. B. Quarles,

father of the plaintiffs herein, made his certain note in favor of the plaintiffs for the sum of $4,490.88, payable on demand, and that on May 31, 1922, application was made by the said G. B. Quarles and H. L. McCaleb for the appointment of said H. L. McCaleb as guardian ad litem of these plaintiffs for the purpose of instituting suit against the said G. B. Quarles upon said note and that on said day the said H. L. McCaleb was appointed guardian ad litem and filed said action, and on the same day by the consent of said G. B. Quarles judgment was rendered in said last mentioned action in favor of these plaintiffs and their said guardian ad litem against the said G. B. Quarles for the sum of $4,490.88, being the case referred to in the plaintiffs' Bill of Complaint; and that on the following day, to-wit: June 1, 1922, the said G. B. Quarles, acting in conjunction with H. L. McCaleb, pretended to make, execute and deliver to the said H. L. McCaleb in his individual capacity a mortgage upon said wool warehouse, a copy of which is attached to plaintiffs' Bill of Complaint.

And defendant further alleges that in the petition for the appointment of said H. L. McCaleb as guardian ad litem, it is set forth and alleged, among other things, that the appointment of a guardian ad litem is necessary to enable the plaintiffs herein as minors to prorate in the proceeds of the sale of the property attached in the said case

of The Citizens National Bank of Salmon vs. G. B. Quarles, above mentioned.

And this defendant further alleges that the mortgage, above mentioned, purporting to cover the said wool warehouse, being the property attached as aforesaid, contains, among other things, a recital therein that the said mortgage does not waive, on the part of the mortgagee therein named, Hugh L. McCaleb, the right as a judgment creditor of G. B. Quarles to share in the proceeds of the sale of any attached property attached in the suit of the said Citizens National Bank of Salmon against the said G. B. Quarles; that by the recitals contained in said petition for the appointment of guardian ad litem, as aforesaid, and the recitals in said mortgage, and by reason of the other matters and things hereinbefore mentioned, the said G. B. Quarles and H. L. McCaleb recognized and acknowledged that the said Citizens National Bank of Salmon, the defendant herein, had duly and regularly levied upon the said wool warehouse in the suit of The Citizens National Bank of Salmon vs. G. B. Quarles, and that said attachment was in full force and effect at the time that the said guardian ad litem was appointed, as aforesaid, and the execution of said alleged mortgage, and that the said H. L. McCaleb and G. B. Quarles at no time questioned the right of the defendant under his said attachment other than the application of the said G. B. Quarles to have said property released from the said attachment on the

ground that there was an excessive amount of property attached, as aforesaid; and that by reason of the matters and things hereinbefore alleged, the said plaintiffs, who claim their interest in and to said property under and by virtue of the said mortgage and the said H. L. McCaleb and G. B. Quarles and Rose Loring Quarles have waived any right to assert that said attachment of the defendant was not good and valid, and are estopped to assert in this action that the plaintiffs or either of them ever had any lien by virtue of said alleged mortgage upon said wool warehouse except a lien subject and subordinate to the lien of the defendant's attachment, and estopped to question the validity of the defendant's levy under its attachment.

WHEREFORE, DEFENDANT having thus made a full answer to all the matters and things contained in the Bill of Complaint, this defendant prays that the Bill be dismissed and that this defendant have such other and further relief as to equity may appertain and to this Honorable Court may seem reasonable and meet in the premises, together with its costs in this behalf incurred.

T. D. JONES
C. W. POMEROY
RALPH H. JONES
Solicitors for Defendant.
Residence and P. O. Add.:
Pocatello, Idaho

(Duly Verified)

Endorsed: Filed Sept. 24, 1926.
W. D. McREYNOLDS, Clerk.
By Theo. J. TURNER, Deputy.

(Title of Court and Cause)

No. 628

STATEMENT OF EVIDENCE UNDER EQUITY RULE NO. 75

BE IT REMEMBERED that pursuant to notice duly given and stipulation of the parties duly extending the time for the taking of such depositions, the depositions of ROSE LORING QUARLES, G. B. QUARLES and JOHN VERNON QUARLES, witnesses on behalf of plaintiffs, were duly taken at Lankershim, California, on April 22, 1927, before Donald M. Redwine, a Notary Public in and for the County of Los Angeles, State of California.

The witness ROSE LORING QUARLES being duly sworn testified on direct examination:

I am the wife of G. B. Quarles. I was married to him at Hope, Idaho, in 1910 and have lived with him as his wife since that time. I lived in Salmon City, Idaho for 12 years after my marriage. I left there in 1922. I remember the warehouse near the railroad station. I was present when the property was auctioned off in 1922 by Mr. J. L. Kirtley, Deputy Sheriff. The property was knocked off to me

and I was announced as the purchaser at that time. Afterwards Mr. Kirtley gave me a bill of sale. I kept this until it was given to John Vernon Quarles. I gave Mr. Kirtley $25.00 for the sale. This was my separate money and Mr. Quarles had no interest in it. After I got the bill of sale the key was given to me by Mr. Kirtley, the same day. We did not do anything with the property until I turned it over to W. C. Smith. Less than a month after the sale we left Salmon for California and I have not been back to Salmon since. When we left I turned the key and the possession of the warehouse to W. C. Smith of Salmon City. J. L. Kirtley was in charge of the warehouse at the time of the sale to which I refer. I gave John Vernon Quarles a Bill of Sale to the property which is dated Septembebr 11, 1925 and is marked Plaintiffs' Exhibit "B". I had been at the warehouse at various times during the summer of 1922. At these times the warehouse was in the possession of G. B. Quarles. I have seen him locking the warehouse during the summer of 1922 and I have seen him at work there during the summer managing and around the warehouse quite a bit. The warehouse was being used for wool. Wool was being hauled in to the warehouse from ranches and shipped from there. Later G. B. Quarles and I executed another agreement conveying this property. I signed plaintiff's Exhibit "C" with my husband and after it was signed it was delivered to John Vernon Quarles.

Plaintiffs' Exhibit marked "B" for identification was attached to the deposition. This exhibit is an instrument entitled Bill of Sale and is dated September 11, 1925, and is signed by Rose Loring Quarles and recites that the party signing the same hereby sells, assigns, transfers and conveys unto John Vernon Quarles all of my right, title and interest of, in and to the said wool warehouse, together with a certain verbal lease between the Gilmore & Pittsburg Railway Company and G. B. Quarles to occupy the land on which the building is constructed, to have and to hold unto John Vernon Quarles, his heirs and assigns.

Plaintiffs' Exhibit marked "C" for identification was attached to the deposition. This exhibit is an instrument entitled "Bill of Sale and Assignment" and is dated June 28, 1926, and is signed by G. B. Quarles and Rose Loring Quarles and recites that the parties signing the same thereby sell, transfer, convey and set over unto John Vernon Quarles and Hope Virginia Finn, of Lankershim, California, share and share alike, all their right, title and interest in and to the wool warehouse heretofore referred to, together with the right to occupy said property, and further assign, transfer, and set over unto said parties all moneys due the parties signing the same from The Citizens National Bank of Salmon, Idaho, on account of damages for withholding possession of said wool warehouse and occupying and using the same since on or about the

12th day of February, 1923, and all rights which the parties signing the same have to an accounting for rents, income, and profits from use and occupancy of said wool warehouse by the said Citizens National Bank. Said exhibit further recites that the wool warehouse was purchased by Rose Loring Quarles on or about September 30, 1922, for the use and benefit of said John Vernon Quarles and Hope Virginia Finn, who were then minors under the age of twenty-one and eighteen years, respectively, and that this transfer and assignment is intended to take effect as of said date but is also intended to convey any and all interest of whatever kind, or howsoever acquired, which the parties signing the same may have in and to said wool warehouse and in and to any claims and demands against the Citizens National Bank of Salmon, by reason of its dealings with, and occupancy and possession of the same.

The witness Rose Loring Quarles continued on direct examination:

"No one has ever paid me anything for the use of the warehouse and I have not received anything as damages from anyone for the taking of the warehouse."

On cross-examination by counsel for defendant the witness Rose Loring Quarles testified:

"Mr. Quarles was present when I bid in the warehouse. It is located on the right-of-way of the Gilmore & Pittsburgh Railway. Mr. G. B. Quarles had

charge of the warehouse a short time before I bought it. The sale was in charge of Mr. Kirtley. He had the keys and was in possession of the property at that time. Mr. Quarles had charge of it ever since it was built. I don't know that he was in it after I bought it. The warehouse was bought on September 30th and we left Salmon along about the middle of October, 1922. I had Mr. Quarles turn the warehouse over to W. C. Smith to look after it. I turned it over to Mr. Quarles, Jr., in September, 1925. I bought it at the suggestion of both myself and Mr. Quarles."

The witness G. B. QUARLES, being duly sworn, testified on direct examination:

"I have lived in Los Angeles, California, since October 23, 1922. Prior to that time I lived in Salmon, Idaho, since March, 1895. I executed a note to my children John Vernon Quarles and Hope Virginia Quarles in May, 1928. I don't remember the exact amount. I think it was Forty-four Hundred Dollars. I gave this note to their uncle, Hugh L. McCaleb, who was my wife's brother. He resided at Dillon, Montana, at that time. I gave the note to him at Salmon, Idaho. It was made payable to John Vernon Quarles and Hope Virginia Quarles. The consideration for this note was money advanced to me by their mother and interest computed at seven per cent. from the time I received it. Their mother's estate was never probated. She did

not leave any debts owing to anyone. She did not have any creditors of any kind or nature at the time of her death. John Vernon Quarles was born October 14, 1903, and Hope Virginia Finn was born July 26, 1907. I built the wool warehouse and took possession of it at the time it was built. The size of the warehouse is 80 x 48, exclusive of a platform on the outside which is 8 x 48. The warehouse is built on concrete piers. George H. Monk and myself had equal interest. The warehouse was built in May, the date of the first Liberty Loan. I purchased Mr. Monk's interest in the warehouse. The warehouse is built on land belonging to Gilmore & Pittsburgh Railway Company and I had a lease from this Company. The bill of sale of Mr. Monk's interest in the warehouse was delivered to me November 20, 1918. After this bill of sale was delivered to me I had exclusive possession of this warehouse. Physically I had exclusive possession from the date on which it was built until the date of Sheriff's sale under foreclosure of the chattel mortgage which was about September 30, 1922. I recall the action commenced against me by the Citizens National Bank of Salmon, Idaho, in February 1922, and the writ of attachment issued in that action. The warehouse was not attached by the Sheriff in that action. No notice was posted on the warehouse by the Sheriff in that action. I was not disturbed in my possession at all during the year 1922 up to the time of the Sheriff's sale on the foreclosure of

the chattel mortgage of which I have spoken. No one ever demanded the keys of this property from me. I never saw anyone there that claimed to be in possession of it. During the year 1922 I used the property as a warehouse for the purpose of receiving and shipping wool, machinery and road material. The business was largely receiving, storing and shipping wool. I received the wool from the flock masters of Lemhi and Custer counties in Idaho. The wool came into the warehouse in bags and was shipped in bags. I shipped it for the people who owned the wool. The wool season in 1922 closed sometime before the 1st of October. The season of 1922 was an average one as far as wool shipping was concerned. There was no other wool warehouse at any time in Salmon, Idaho, that was used for the purpose of shipping this wool. I had the key to the warehouse at all times in 1922 until the Sheriff took possession on the foreclosure of this chattel mortgage. I recall the time of the sale of this warehouse by the Sheriff of Lemhi County under foreclosure of this chattel mortgage. The sale was made by James L. Kirtley, Jr., deputy sheriff. I was present at the sale. I believe it was about September 30th. There was only one bid on the property. This was made by Rose Loring Quarles, my wife. The Sheriff gave her the keys at the time of the sale. He took them from me at the time he took possession of the warehouse. After the sale of this property to Mrs. Quarles the keys and the

possession of the property were turned over to W. C. Smith of Lemhi County. This was somewhere between the 30th of September, 1922, and the 12th of October, 1922. Mr. Smith had the keys when we left Salmon City. We left on the 12th of October, 1922. I did not sell any interest in this property to anyone up to the time I gave the mortgage. In 1922 the warehouse was under lock and key when I was not there. When I left the warehouse I locked it up. Before the wool season began and after the wool season began part of the time I was there every day from early to late and part of the time I was not there at all. Some days not at all, but many days from early to late. I was not in the warehouse at the time this attachment was issued in 1922. I was sick that day. It might have been a week or two or three days after the attachment was had that I was there. When I went there, there was nobody there. No one notified me that he was custodian of the warehouse. There was no one custodian of the warehouse. Absolutely no one claimed possession of it. I heard of absolutely no one having or claiming possession of the warehouse. This is true of all times in 1922 up to the time the Sheriff took possession of it under the foreclosure of the chattel mortgage.

"Q. Did you talk to Mrs. Quarles about purchasing the warehouse?

A. Yes. I said that she should buy it and that

I would be able to pay the judgment or that the warehouse would go to John and Virginia.

Q. Did she ever make any conveyance of that warehouse to you?

A. She never did.

Q. Did you ever have any interest in the warehouse after she bought the property in at foreclosure sale?

A. No.

Q. Did you ever claim an interest in the warehouse after that time?

A. No.

Q. Has anyone ever paid you anything for the use of the warehouse since that time?

A. No."

On cross-examination by counsel for defendant the witness G. B. Quarles testified:

"The note to my children I believe was made on the 31st of May, 1922. The following day I had Hugh McCaleb appointed as guardian for the two children and the day following that suit was brought on the note and judgment confessed for $4,490.88. On the 1st day of June of the same year I executed a mortgage to H. L. McCaleb upon the warehouse property, which was the mortgage that was foreclosed. Prior to that time some two or three months suit had been brought against me by the Citizens National Bank of Salmon, and an attachment issued. They served on me a copy of the complaint, copy of the summons and a copy of the

writ of attachment and a notice that certain property was attached and I think the notice specified the particular property attached. At the time the writ of attachment and notice was served on me the Bank did not put a keeper in charge of any of my property. They never demanded of me the key to the warehouse. They never took possession of the warehouse. There was a notice served on me.

Q. I presume the notice was the usual notice on the back of the writ of attachment?

A. Attached to the writ of attachment. It was a typewritten notice that the Sheriff had attached certain property, describing them, including my home, the California Bar Placer Mining claims, certain lots in Finstur's subdivision, Salmon, the Redbird mines, $21,000.00 worth of stock in the Citizens National Bank.

Q. You knew that the warehouse had been attached?

A. I know he (the sheriff) said it was going to be attached.

Q. Wasn't that the reason why you changed the lock?

A. No, I had valuable wool in there.

Q. You were served with attachment papers?

A. I was.

Q. You knew the wool warehouse was attached?

A. He said it was going to be attached.

Q. Didn't he tell you he had attached it when he served the papers?

A. No sir—said he was going to.

Q. You knew that the wool warehouse had been attached at the time that you gave the mortgage on the warehouse?

A. No sir.

Q. You received notice of attachment didn't you?

A. Yes.

Q. So that you must have had notice that the warehouse was attached if you received the notice?

A. No.

Q. The attachment notice was served prior to the time you gave the mortgage?

A. Yes.

Q. And prior to the giving of the mortgage you had received this notice?

A. Yes.

Q. And afterwards at the proceedings in the case of Citizens National Bank v. yourself you made a motion to dissolve the attachment?

A. Yes.

Q. In that motion to dissolve you specifically enumerated your mining property, city lots, warehouse, etc.?

A. Yes.

Q. So that you must have known at the time the motion was made that the warehouse was attached?

A. The motion speaks for itself and says that

the Sheriff purports to have attached the warehouse—the fact of the matter was he didn't.

Q. That is your opinion?

A. Yes.

Q. When you testified before the Commissioner at Los Angeles you testified that this typewritten notice that the Sheriff had attached your property was served upon you. Do you have that notice now?

A. If I have it Mr. Haga has it.

Q. You testified it was a typewritten notice that the Sheriff had attached certain properties, describing them, including my home, the California Bar Placer Mining claims, certain lots in Salmon, the Redbird Mines, $21,000 worth of stock in the Citizens National Bank?

A. I think so?

Q. Only one notice was served upon you?

A. I think so.

Q. And that included the wool warehouse as well as other property?

A. Yes.

Q. I presume Mr. McCaleb in his action here was prompted entirely by your suggestion?

A. It was his desire to protect his niece and nephew.

Q. He was the uncle of your two children and your brother-in-law?

A. He was.

Q. And the suits were brought at your suggestion and request?

A. They were.

Q. You later moved to discharge the attachment, Mr. Quarles, on the ground that an excessive amount of property was levied on?

A. I did and the Court declined the motion.

Q. In that action was any specific mention made of the warehouse?

A. I think there was. Yes.

"I endeavored to have it released as to the warehouse especially for the reason that the Sheriff had in his return of attachment shown that he had attached the warehouse and put a keeper in charge of the warehouse. The question of whether there was a keeper in charge of the warehouse was not one of the questions that arose at the time I moved to have the attachment dissolved. The reason for the motion was the excess levied. He mentioned in his return that he had attached it, that was why the warehouse was mentioned. In the mortgage which I gave to McCaleb, as is set forth in the mortgage, I made a recital that I did not waive on the part of the mortgagee the writ of attachment or a guarantee of share in the proceeds of the attached property. The motion went to discharge the major portion of the property, but I think the $21,000.00 worth of Bank stock was not covered. The motion was to discharge from the attachment all of the

property excepting the $21,000.00 worth of Bank stock. The motion speaks for itself.

The witness JOHN VERNON QUARLES, being duly sworn, testified on direct examination:

"I reside in Lankershim, California, I am 23 years old and I have lived here a little over one year. Before I came to Lankershim I spent four years in Exeter, New Hampshire and a little over four years in Princeton, New Jersey, for the purpose of education. My home has always been with my father. When my father was in Idaho my home was with him. I spent my summer vacations in Idaho. In 1921 I spent the summer months of July and August and part of June and September there and about the same period in 1922. I am acquainted with the location of the wool warehouse which my father owned at that time. It was on the right-of-way of the Gilmore & Pittsburgh railroad, some one thousand feet west of the depot on the same railroad. I saw the warehouse in 1921 on numerous occasions when my father was in the discharge of the business for which the warehouse was constructed. I would say that I saw it about five times a week that summer. My father had possession of it at that time. He was using it to conduct the business of receiving, storing and shipping wool. During 1922 I was in Salmon part of June, all of July, all of August and part of September. During that time I saw the warehouse approximately five times a week. My father was in possession of it

at that time. It was being used for the purpose of receiving, storing and shipping wool and for other purposes. My father had the keys at that time. I saw him unlock the warehouse on every occasion when I accompanied him there during that period. The warehouse had two doors both completely closed. When the doors were closed no one could get in with the possible exception of scaling a window in the gables used for ventilation. Both doors have locks, one locking from the outside, the other from the inside. On numerous occasions in 1922 I assisted my father. I never saw aynone else with the keys in 1922 and never saw anyone else who claimed to have possession. I never saw anyone else but my father delivering wool or getting wool out in 1922. I did not see any notice of any kind posted on the warehouse when I was there in 1922. I left in September that year before my father left. I did not see anyone around there who claimed to be in possession of the property except my father. I am acquainted with T. J. Stroud, Sheriff of Lemhi County, Idaho. I did not have any conversation with him in 1922 about having possession of this warehouse. I know Mr. H. G. King and I did not have any conversation with him at any time in regard to possession of this warehouse."

Pursuant to notice duly given and stipulation of the parties duly extending the time for taking such depositions, the depositions of H. G. KING, W. W. SIMMONDS, T. J. STROUD, W. C. SMITH and

J. Z. MOORE, witnesses on behalf of plaintiffs, were duly taken as follows: W. C. Smith, W. W. Simmonds, T. J. Stroud and H. G. King on May 3rd, 1927, and J. Z. Moore on May 9, 1927, all at Salmon City, Idaho, and all before L. E. Glennon, a Notary Public in and for the State of Idaho.

The witness H. G. KING, being duly sworn, testified on direct examination:

"I am 68 years old and I live at Salmon, Idaho. My occupation is gentleman of leisure. I have lived at Salmon 20 years and lived there throughout the year 1922. I remember the attachment proceedings in the suit of the Citizens National Bank of Salmon against G. B. Quarles. I was appointed custodian of the attached property by the Sheriff Tommy Stroud. I think it was the deputy that did the business with me. The Sheriff or his deputy, Mr. Kirtley, came and asked me one day in the bank whether I would act as custodian of the warehouse in that attachment suit. He stated that the law required them to have a custodian appointed. I remember at the time he said the duties would not be very strenuous and would not take much of my time if I would accept the appointment, and I told him that I would. At that time he left me one key of the warehouse. I was over quite a number of times. I forget whether I went over the same day I was appointed or not. I might add though if I remember rightly he told me I would not have to do anything with the contents of the warehouse. It was

just the warehouse I was custodian of. The warehouse was locked. I don't know of any other person who had keys to the warehouse and I did not put any new locks on the warehouse. This is the wool warehouse that is located on the right-of-way of the Gilmore & Pittsburgh Railroad about one thousand feet west of the depot at Salmon. G. B. Quarles did not operate that warehouse at the time I was custodian of it to my knowledge. I didn't see him there. I couldn't state the exact number of times I was actually in the warehouse after I was appointed custodian but I do know of several occasions that I had to go over there. Once or twice I went over with Mr. Boomer's representative, Mr. Rodgers, who had a portion of that warehouse partitioned off where he had supplies and I went over and opened the outer door for Mr. Rodgers. I think it was in April, 1922, I was appointed custodian. I was never notified that I was not custodian up to the present time. I have no official notice as to my appointment being cancelled. I rather think the warehouse was used as a wool warehouse during my custodianship. People were storing wool and taking it in and out. I don't know who had charge of the moving of the contents. I had a key and whoever was permitted to go in there, I let them in when I knew they were legally entitled to go in and their stuff there. I did not collect any revenue or rent or storage on the warehouse when I was in

charge. I don't know whether they were collected or not."

On cross-examination by counsel for the defendant the witness H. G. King testified:

"It was J. L. Kirtley, the deputy sheriff who appointed me. At the time the appointment was made Mr. Kirtley handed me the key. I kept the warehouse locked when I was not present. I was by the warehouse every day. I was going back and forth home and I passed the warehouse whenever I went back and forth. I know Frank H. Haveman well. He did not at any time when I was in charge of the warehouse attempt to dispute my right to the control and dominion over the warehouse. G. B. Quarles never disputed my control, right or dominion. In fact no one did. No one to my knowledge had any key to the warehouse except myself. During the time I was in possession of the warehouse Mr. Quarles never to my knowledge attempted to act in charge of it. I recall the sale of this warehouse during February, 1923, in the action of Citizens National Bank against Quarles. I don't know who had charge of it at that time for the simple reason that I have never been discharged so far as I know. Since it was sold I think the Citizens National Bank operates it for storing wool for their customers. During the time I was in possession in the year 1922 I don't remember having been served with any foreclosure papers and I did not during that year at the request of the Sheriff sur-

render up the building to anyone, and the Sheriff did not to my knowledge attempt to put anyone in charge of the building in place of me."

On re-direct examination by counsel for plaintiffs the witness H. G. King testified:

"I had a conversation with Mr. Kirtley first. He came and asked me if I would act as custodian and then he said I will have the papers drawn up and the appointment made and it was on the second occasion that the appointment was made and he handed me the key and told me that I was appointed custodian."

On re-cross examination by counsel for defendant the witness H. G. King testified:

"I don't recall whether I executed any paper that I would act as custodian. I remember that the warehouse was sold under attachment to the Citizens National Bank. When the property was sold I had no written or verbal notice from the Sheriff that my duties as custodian had ceased. I did have actual notice that the property had been sold to the Citizens National Bank by the Sheriff and after that time I didn't attempt to control or exercise acts of dominion over the property. That was because of the fact that the Bank had bought the property."

The witness W. W. SIMMONDS, being first duly sworn, testified on direct examination:

"I am the clerk of the District Court and ex-

Officio Auditor and Recorder in and for Lemhi County, Idaho, and have held this position since the second Monday of January, 1919. As such I have the custody and control of all court records."

It was then admitted that Mr. Simmonds is clerk of the court and that he is the legal custodian of records and papers pertaining to his office.

Whereupon the following Exhibits were identified by Mr. Simmonds and were admitted in evidence:

Plaintiff's Exhibit "E": The petition for appointment of a guardian ad litem in the case of John Vernon Quarles and Hope Virginia Quarles, infants, by H. L. McCaleb, guardian ad litem, plaintiff, against G. B. Quarles, defendant; filed May 31, 1922, signed by H. L. McCaleb and G. B. Quarles; containing the following recitals: H. L. McCaleb is an uncle of the minors; that The Citizens National Bank has commenced an action against G. B. Quarles and attached the property of the said Quarles; that the guardian ad litem is necessary so that the minors may obtain judgment and pro rate in the proceeds of the sale of the attached property.

Plaintiff's Exhibit "C": A chattel mortgage dated June 1, 1922, from G. B. Quarles, mortgagor, to H. L. McCaleb, mortgagee, covering the wool warehouse being a frame structure, sides and roof of iron and concrete foundation, also one certain automobile as additional security to secure the payment of a judgment against the mortgagor in favor

of the mortgagee as guardian ad litem of said minors, which judgment is dated May 31, 1922, and which mortgage recites that the mortgage does not in any way waive the right of the judgment creditor of the mortgagor to share in the proceeds of any property attached in the suit of Citizens National Bank against G. B. Quarles. Mortgage recorded at the request of the mortgagee June 1, 1922.

Plaintiff's Exhibit "G": Writ of Attachment issued out of the District Court of the State of Idaho, for Lemhi County, in the case of The Citizens National Bank of Salmon, a corporation, plaintiff, against G. B. Quarles, defendant, dated and sealed April 15, 1922, directing the Sheriff of said County to attach and safely keep all the property of the defendant to satisfy plaintiff's demand of $5456.99.

The Sheriff's return on the said Writ of Attachment, executed by T. J. Stroud, Sheriff, by J. L. Kirtley, Deputy, dated April 17, 1922, stating that he attached certain real estate and shares of stock of the defendant and also containing the following recitals: I attached that certain building known as the wool warehouse, the same being designated by plaintiff as personal property, levied upon as such and placed in the hands of H. G. King, as custodian.

Plaintiff's Exhibit "F", containing a motion to discharge attached property in the case Citizens National Bank against Quarles, in the District Court of Lemhi County, Idaho, dated and filed July 14, 1922, signed by G. B. Quarles in person, on the

ground that the amount of property attached is excessive, and which motion contains among other matters the following recitals: the Sheriff reports to have levied upon as personal property that certain wool warehouse which is the property of said defendant; that the writ was levied April 17, 1922, and that the time has lapsed within which other creditors could procure judgments and pro rate in the proceeds of the sale of the attached property; that the defendant moves that all of the property so attached with the exception of 185 shares of the stock of the Citizens National Bank be discharged from the lien of attachment and that the discharge be established of record except as to said stock.

An order denying the said motion to discharge attached property, dated July 28, 1922, filed August 3, 1922, in the case of Citizens National Bank against Quarles, except upon the bond given by the defendant in the sum of $6500.00 as provided by Section 6811, Idaho Compiled Statutes.

Defendant's Exhibit 1, containing a Writ of Execution out of the said District Court in the case of Citizens National Bank against G. B. Quarles dated and sealed January 15, 1923, directed to the Sheriff of Lemhi County and containing among other matters the following recitals: That it is based upon a judgment for $5291.38 entered in said case on October 2, 1922, all of which is unpaid; that the following described property, as well as other property was attached on April 15, 1922, all right, title and

interest of G. B. Quarles in and to the said wool warehouse; commanding the said Sheriff to sell the said property to satisfy the said judgment. The Sheriff's return attached thereto is dated February 12, 1923, and contains among other matters the following recitals: that on January 15, 1923, the Sheriff relevied on the said wool warehouse, noticed the same for sale as the law directs and on January 22, 1923, sold the wool warehouse to E. E. Edwards for the Citizens National Bank.

The witness T. J. STROUD, being duly sworn, testified on direct examination:

"I was Sheriff of Lemhi County during the years 1922 and 1923; during said time a levy of attachment in the case of Citizens National Bank vs. G. B. Quarles was made by my office; J. L. Kirtley, who was Deputy Sheriff at that time, served the papers. I did not personally serve or levy any Writs of Attachment in that case. I always went over the papers and attachments in cases of this kind before they left the office."

On cross examination by counsel for defendant the witness T. J. Stroud testified:

"I went over the papers in the office in the case in question before they were served. Mr. Kirtley prepared the papers and after they were prepared I went over them. A summons, attachment and notice of attachment were given to Mr. Kirtley to serve. The notice was to the effect that certain

property is attached—the warehouse. I don't find a copy of the Notice of Attachment that was to be served upon Mr. Quarles attached to plaintiff's Exhibit "G". There is one thing I would like to have understood; when these papers were returned I wouldn't say the notice was attached to the writ, but it left the office to be served upon Mr. Quarles. I went over the matter of the service of the papers with Mr. Kirtley. When Mr. Kirtley came back he gave me a list of the papers that were served and he copied them on the Day Book and I copied them on the Attorney's Record, all papers that were served in the case. I made a charge on my book for a Notice of Attachment, that the warehouse was attached. It will appear on my book in the charge I made for the copies. I don't think that I instructed Mr. Kirtley to serve the notice that the wool warehouse was attached, upon Mr. Quarles, along with the Writ of Attachment, as Mr. Kirtley knew. Mr. Kirtley had served papers a great many times during that time. I instructed him to be careful about serving papers in the case. When Mr. Kirtley came back after serving the papers he did not have in his possession the notice that was to be served upon Mr. Quarles. Mr. Kirtley is now dead. When Mr. Kirtley left the office to serve these papers he took with him the original notice that the warehouse was to be attached. When he returned he did not have the original. Mr. Kirtley told me that he served the papers on Mr. Quarles and he gave me a list of

them and this list included a copy of the Writ of Attachment and a copy of the notice to Mr. Quarles that the wool warehouse in his possession was attached by virtue of the Writ."

On re-direct examination by counsel for the plaintiff the witness T. J. Stroud testified:

"In regard to the service of papers in the case of Citizens National Bank vs. G. B. Quarles in the attachment procedure, I stated that a notice that certain personal property was attached was taken out to be served upon Quarles. It was the custom of my office in some cases to serve the Notice of Attachment on persons whose personal property was attached; the form of notice was just simply a notice that this certain warehouse was attached. I had a Writ of Attachment, also a typewritten notice. I think something is left out of the Sheriff's return on attachment in plaintiff's Exhibit "G" referring to the certain Writ or Notice. I am familiar with Mr. Kirtley's handwriting. The return was made by him. I don't know of my own knowledge whether Mr. Kirtley served the notice that the property was attached by virtue of the Writ. I wasn't with him. I wouldn't say."

On re-cross examination by counsel for the defendant the witness T. J. Stroud testified:

"When I say that the Sheriff's return on attachment does not contain everything that was done I mean that it didn't contain a statement of the fact that a notice that the wool warehouse in question

under the control of G. B. Quarles and belonging to him was attached by virtue of the Writ of Attachment. I wouldn't say it was served. I could say it left the Court House. Mr. Kirtley gave me a list and if that statement of Mr. Kirtley's was correct it should have contained a statement of what he did."

On re-direct examination by counsel for the plaintiff the witness T. J. Stroud testified:

"Plaintiff's Exhibit "D" is the return in the case of H. L. McCaleb, guardian of John V. Quarles and Hope Virginia Quarles vs. G. B. Quarles under summary foreclosure of chattel mortgage. The affidavit for foreclosure of the chattel mortgage and the Notice of Sale were placed in my hands for service and I served it upon G. B. Quarles and I took into my possession the personal property therein specified, which property consisted of the wool warehouse and a seven-passenger six-cylinder Studebaker touring car. The warehouse is on the G. & P. right-of-way near Salmon. I think I also served a demand for peaceable possession on G. B. Quarles and a Notice of sale of the summary foreclosure proceedings; I obtained peaceable possession of the property and it seems to me that in furtherance of these foreclosure proceedings we appointed Frank H. Havemann as keeper. We posted Notice of Sale on September 25, 1922, and in pursuance of these notices we held the sale on Septem-

ber 30, 1922. I sold the property to Rose Loring Quarles."

On re-cross examination by counsel for defendant the witness T. J. Stroud testified:

"I am under the impression that it was G. B. Quarles who handed me the papers that I have been describing for the foreclosure of this mortgage. I am not sure. At the time I stated that I served the notice upon G. B. Quarles it was subsequent to the time that I had already attached the property for the Citizens National Bank. I already had in my possession this wool warehouse under the Writ of Attachment that was levied on April 17, 1922, at the time these foreclosure papers were handed me and whatever I did was done subject to the Writ of Attachment. At the time the foreclosure proceedings were taken the wool warehouse was in my hands and also in the hands of Mr. King as custodian by virtue of the Writ of Attachment .When I appointed Havemann as custodian for the foreclosure proceedings his duties were subject and subsequent to the duties of Mr. King. In my return on the foreclosure proceedings I set forth that I offered all the right, title and interest of G. B. Quarles and that was the right, title and interest subject and subsequent to the attachment that was already on it. My return shows that Rose Loring Quarles was the highest and best bidder for all the right, title and interest of G. B. Quarles in and to that property and I sold such interest for the sum of $25.00

to Rose Loring Quarles. I don't remember whether Rose Loring Quarles ever paid me any money. When I say that I obtained peaceful possession of the warehouse I meant that I already had it and took it again and sold it under this foreclosure subject to the attachment. I don't know who prepared the affidavit for foreclosure of chattel mortgage by notice and sale."

On re-direct examination by counsel for the plaintiff the witness T. J. Stroud testified:

"I hardly think Mr. Kirtley drew up the return on the chattel mortgage foreclosure proceedings in plaintiff's Exhibit "D". In regard to that part of the return where it says 'I offered to sell all the right, title and interest of G. B. Quarles, mortgagor, in and to aforementioned wool warehouse' it was my custom and the custom of the Sheriff's office at the time I was in it in making sale of property under any kind of process to use those words, and that was all the Sheriff could sell in fact. When I stated that I made the sale under that foreclosure under notice and sale subject to a previous attachment of the Citizens Bank I do not wish to be understood as passing upon the priority of those two liens."

Q. You stated of having possession of the wool warehouse at the time of the Summary Foreclosure, you didn't have actual possession of that property?

A. Had a keeper.

Q. Had possession through the keeper, Mr. H. G. King?

A. Yes sir.

Q. You didn't have actual personal possession yourself, you didn't act as keeper yourself?

A. No.

The witness W. C. SMITH, being duly sworn, testified on direct examination:

"I live in Salmon, Idaho, and am acquainted with G. B. Quarles, John V. Quarles and Hope Virginia Quarles. My business is abstracting. In addition to running the abstract business I sometimes act as a buyer of wool for Adams & Leland of Boston. I was acting as such buyer in 1922 and purchased wool in Lemhi County in that year. The wool which I purchased was stored in the warehouse on the Gilmore & Pittsburgh right-of-way in Salmon. E. E. Edwards had charge of it during the year 1922. He was president of the Citizens Bank. G. B. Quarles was in possession of it in the forepart of 1922 up to August 1st. I think it was in the fall of 1922 that G. B. Quarles left Salmon, according to my records. The man who owned this wool paid the storage charges to Mr. Quarles. In the fall of 1922 G. B. Quarles informed me that the warehouse was the property of Rose Loring Quarles. Mr. Quarles said if I would take charge of it from the time he left the 1st of August, 1922, I could have twenty-five per cent. of what was taken in from the wool warehouse. I opened an account in my books with Rose Loring Quarles. There were charges for storage under the heading. At the time the wool warehouse

was turned over to me by Quarles the keys were not given to me. I don't think I ever made any trips to the wool warehouse to let anyone in for anything, to take anything from the warehouse, except wool. Of course, I was there when the wool was all weighed. I did not have a key. After Quarles told me to take possession of the warehouse the Sheriff put on another lock and a new key, attached it and took charge of it. Possibly I had the keys. It was after Quarles left Salmon that the Sheriff took charge of the warehouse. My first entry was August 1, 1922. I take it G. B. Quarles left just before that. He was in possession up to that time and I did business with him."

On cross-examination by counsel for defendant the witness W. C. Smith testified:

"Prior to August 1, 1922, I did my business direct with Mr. Quarles. After August 1, 1922, Mr. Quarles told me that Rose Loring Quarles was the owner of the property and I assumed to act for Rose Loring Quarles. I did my business with G. B. Quarles, Rose Loring Quarles was his wife."

The witness J. Z. MOORE, being duly sworn, testified on direct examination by counsel for plaintiffs:

"I am railroad agent for the Gilmore & Pittsburgh Railroad at Salmon, Idaho. I am acquainted with G. B. Quarles and John Vernon Quarles. I was acquainted with G. B. Quarles during the year 1922 from January 1st to about October 12th. Some-

where along there. I am familiar with the building located on the Gilmore & Pittsburgh right-of-way about a thousand feet west of the depot in Salmon, which is commonly known as the wool warehouse. I don't know whether G. B. Quarles was operating the wool warehouse in 1922. I don't know who was operating it. He was around there acting as guardian. During the year he left there he was there during the wool shipping period up to the time he left, more or less. He loaded a car there somewhere along that period. I think it was consigned to his wife. She was the shipper. I remember H. G. King. I don't know anything about his being in possession of the wool warehouse. I know Thomas J. Stroud. I don't know whether the wool warehouse was in his possession during the year 1922. I know J. L. Kirtley. I don't know whether he was in possession of the warehouse in 1922."

On cross-examination by counsel for defendant the witness J. Z. Moore testified:

"When we had anything in the wool warehouse to ship out G. B. Quarles was apparently the guardian or whatever his capacity was. I do not know who was in actual possession of the wool warehouse during that time. I don't know anything about whether Mr. Quarles put wool in the warehouse and took it out with the consent of some other party. Mr. Stroud, the Sheriff, and Mr. Kirtley, the Deputy Sheriff, could have been in possession of the wool

warehouse in 1922. All I paid attention to was the man who handled the business."

Pursuant to notice duly given and stipulation of the parties duly extending the time for taking such depositions, the deposition of LOUIS F. RAMEY, and the further depositions of H. G. KING and W. C. SMITH, witnesses on behalf of plaintiffs, were duly taken on the 26th day of September, 1927, at Salmon City, Idaho, before L. E. Glennon, a Notary Public in and for the State of Idaho:

The witness LOUIS F. RAMEY, being duly sworn, testified on direct examination by counsel for plaintiffs:

"I have lived practically 30 years in Lemhi County. I was here in the year 1922. I was engaged in ranching and livestock business that year. I think I sold G. B. Quarles some wool that year, that is through him. I did my business with Mr. Quarles at the wool warehouse on the Gilmore & Pittsburgh Railroad right-of-way. I think it was the latter part of June or the forepart of July. This was wool that was shorn from sheep which I owned. I handled the wool for Tom Kane at the same time I delivered my own. This wool was delivered to Mr. Quarles at the wool warehouse. He was receiving wool for shipment. I am very positive that I did not see Mr. H. G. King at the warehouse at the time I delivered the wool. I had no business with Mr. King that year in connection with the use

of the warehouse. G. B. Quarles appeared to be in charge of the warehouse when I was around there during the year 1922, the latter part of June or the forepart of July."

On cross-examination by counsel for defendant the witness Louis F. Ramey testified:

"I was at the warehouse once with the wool. I don't think I was at the warehouse except when I delivered the wool there and turned it over to Mr. Quarles. At that time Mr. King was not there. Further than that I don't know whether Mr. King was at the warehouse or not. I know nothing of it."

On re-direct examination by counsel for plaintiffs the witness Louis F. Ramey testified:

"I didn't get my money until the wool was loaded. I don't know just where it was I got the money. I got the money from G. B. Quarles."

On re-cross-examination by counsel for defendant, witness Louis F. Ramey testified:

"Mr. Quarles paid me by check but whether it was his personal check or check on firm who handled the wool I couldn't say. He didn't pay me off at the warehouse."

The witness H. G. KING, being duly sworn, testified on direct examination by counsel for plaintiffs:

"I have already testified by giving my deposition

in this case sometime ago. Since that time there has come to my attention some checks that I recognize as having been in my possession before. I signed on the back of this check. This is a check from Lemhi County Wools by G. B. Quarles, dated May 18, 1922, it is payable to the order of M. J. King for the sum of Two Hundred Dollars. This is another check similar to the first except the sum is $69.25 and the date is May 20th, payable to M. J. King. I endorsed my name on the back as was the custom in matters of that kind. These checks were given for a little bunch of wool that belonged to Richards Brothers on which Mrs. King held a mortgage, and was sold to Mr. Quarles. Mr. Quarles bought the wool or handled the wool, whether he was agent for some company I am sure I forget. Mr. Quarles paid me for the wool and if I remember rightly he rendered me a statement that the check for $200.00 was given in part payment and the $69.25 in full payment. That was the wool that belonged to D. C. Richards. This would be the 1922 clip. It might have been left-over wool from 1921. I think it was 1922. Mrs. King could remember better than I. The wool was shipped down from Lemhi here and it was stored and then kept here until a full car was made. It was placed in the wool warehouse. I don't know by whom it was stored. It was sold to Mr. Quarles. I did not have anything to do with storing it or loading it out of the warehouse. I do know that the wool was shipped down

from Lemhi because there wasn't a carload of it and Mr. Quarles wanted it shipped down here so as to fill out and make up a car."

(The two checks above mentioned were then marked for identification as plaintiffs' Exhibits "H" and "I", to be attached to the deposition, and the examination was continued.)

"During the summer of 1922 from the time I was appointed by the Sheriff as custodian of the warehouse I did not to my knowledge take in any wool or store any wool or any other articles in the warehouse during that period after my appointment as custodian. I did not take any rent for the use of the warehouse during that period. I did not load anything out of the warehouse during that period. When I stated in my former deposition that I went by the warehouse substantially every day I meant that I had to go by the warehouse approximately three times a day driving back and forth up home. I traveled in my car sometimes and sometimes I walked. I took Main street in going home. The warehouse is situated about two blocks on the left hand side of Main street on the north side of Main street. Full two blocks between the railroad and Main street. The warehouse is on this side of the right-of-way. And that is what I meant in saying that I went by the warehouse every day. That is the road I took before and since that year in going from the city to my home. There was no change in going by the warehouse during the year I was cus-

todian, just the same as I always traveled. I referred in my former deposition to Mr. Rodgers. He was Mr. Boomer's head man here that looked after his books, records and supplies. In other words you would say that Mr. Rodgers was Mr. Boomer's right hand man here. Mr. Boomer was a contractor for road building in this County. He built the Challis road and up the Lemhi at the Indian reservation. The Salmon-Challis road which I refer to is the one from the City of Salmon towards Challis. During the time they were building that road they were using part of the warehouse. The part that Mr. Rodgers had rented took up a space approximately, I would say, about one-fifth of the warehouse in the southwest corner. This was partitioned off and he carried a great many supplies there of different descriptions. I was keeping books for the Shenon Land Company and Mr. Boomer was president of the Company. I remember going over to the warehouse for Mr. Rodgers on one or more occasions. I can't say how many times I went over there with him. I remember at least once. I have no particular way or means of fixing the exact time. It might have been before I was custodian, or while I was custodian. I kept no record during my custodianship with any business of the warehouse. I took in no rentals or storage charges and received no compensation as custodian up to the present time. I cannot remember of any other occasion while I was custodian of going to the warehouse except that I

might have gone with Mr. Rodgers once. When I was appointed custodian Mr. Kirtley came to me and it was in the bank when he first approached me to the best of my memory, he asked me if I would act as custodian as it was necessary to have a custodian appointed and it wouldn't entail any hardships or duties and I then agreed to accept and a little later he made the appointment and notified me of it. I was not notified to deliver possession to the purchaser when the warehouse was sold in January or February, 1923. They didn't come to me and ask for any discharge or to deliver possession to the purchaser."

On cross-examination by counsel for defendant the witness H. G. King testified:

"The only thing I know about the checks, plaintiff's exhibits "H" and "I" is that they were given to M. J. King by G. B. Quarles in payment for Mr. Richards' wool. I don't know of my knowledge where it was delivered except it was shipped down from Lemhi to Mr. Quarles and then he looked after it and paid for it. The warehouse stands northerly from Main street about two blocks on the railroad right-of-way on the southerly side of the railroad track. There are no buildings or any trees or other obstructions to the view between the warehouse and Main street where I passed it. One way the warehouse would be visible for five blocks in coming down from my house. This way I could see it for

five blocks and then I couldn't see it any more after I got opposite it for more than half a block. I guess there would be two blocks between the warehouse and Main street where there are no buildings. I am familiar with the tract of land owned by Mr. Glennon known as the Parkway Addition on the north side of Main street. It would depend entirely upon what you consider the length of a block as to whether this addition is three blocks long lengthwise along Main street. In Salt Lake City a block is six hundred feet and some places three hundred feet. I could not answer as to whether it is two blocks from Main street back to the warehouse. I could approximate the distance between the warehouse and Main street. I would judge from Main street directly across to the warehouse to be about 800 feet. In order for Mr. Boomer to get in to the corner used by him it was necessary to go through one of the two outside doors of the building. Not to my knowledge did the Shenon Land Company have anything to do with the Boomer contracts for the highway. The Shenon Land Company is a corporation. During the time when Mr. Boomer was here in road construction work I was bookkeeper for the Shenon Land Cmpany. I did not make any entries in the Shenon Land Company's books with reference to expenditures or income from highway contracts. The Shenon Land Company had nothing to do with the highway contracts."

On re-direct examination by counsel for plaintiffs warehouse as I have testified."

"When I stated before that during the time I was acting as custodian of the warehouse I did not find Mr. Quarles in charge of the warehouse in the summer of 1922 I was basing that on my going to the warehouse as I has testified."

The witness W. C. SMITH, being duly sworn, on direct examination by counsel for plaintiffs testified:

"I testified on a former occasion in this case. I think that Mr. and Mrs. Quarles left Salmon sometime in October. I cannot fix the exact date. With reference to that time it was just a day or two before that Mr. Quarles requested me to act as agent in charge of the warehouse for Mrs. Quarles. I had the warehouse in my charge until the 1st of the year. The Sheriff put another lock on it and took charge of it for the Citizens Bank and the key which Mr. Quarles had given to me didn't fit. During the time I was immediately in charge I stored and took out goods. I handled it on a commission basis. Later I gave my check to Mrs. Quarles for her share of the storage I had taken in. Mr. Edwards did not have anything to do with the warehouse while Mr. Quarles had anything to do with it. I did business with Mr. Quarles from the middle of April, 1922, until Mr. Quarles turned the warehouse over to me

in October, with reference to storing and loading wool out of the warehouse."

On cross-examination by counsel for defendant the witness W. C. Smith testified:

"I couldn't tell the exact date when the warehouse was attached. I can't remember exactly when the execution was levied on the warehouse by the Citizens Bank. I testified before that I didn't know the exact date. I think it was along the 1st of the year, but I can't remember. I am guessing at the date. I don't know how I can remember the exact date. I am very positive that Mr. Edwards wasn't in charge of the warehouse and I know and am so positive because Mr. Quarles was in charge of the Bank and in charge of the warehouse. I think I recall when Mr. Edwards became president of the Citizens Bank, it was in January, 1922. It was after that the attachment was levied on the warehouse. I told you it was hard for me to remember the year but after Mr. Quarles left there they attached it. After that there was wool in there. Mr. Quarles had wool in there. I tell you I don't think I will testify but I will get my records. I don't want to get mixed up. I can't remember the time now when the attachment was levied on the warehouse by the Citizens National Bank, from the record I know, that is all. I think my testimony was tied to the execution. The execution was levied about January, 1923. It was about October, 1922, I claimed

to have gone in charge of the warehouse. Prior to that time or just before that time Mr. Quarles was in charge of the warehouse. As near as I can remember his custody began from the time he built the warehouse up to that time, October 1, 1922. I don't think that the Citizens National Bank ever went into custody or charge of the wool warehouse during the year 1922 and I don't think Mr. E. E. Edwards did. I was at the warehouse during June and July, 1922, loading wool. Mr. Quarles talked to me about taking over the warehouse in October. Rose Loring Quarles never talked to me about it. I went into possession as a result of a conversation with G. B. Quarles. He said she was the owner of the warehouse. I made payment of a portion of the transfer fees by check payable to Rose Loring Quarles. I gave the check to G. B. Quarles. The check has never been returned to me. I don't know who endorsed it for payment. After the levy of the execution in 1923 I didn't have anything to do with the warehouse until the 1st of March, 1927. I didn't have charge of it. I was in there every summer loading wool out of it. I have charge of it now."

G. B. Quarles, being called as a witness for plaintiff on the trial of the cause on October 26, 1927, testified as follows:

"I am the G. B. Quarles who heretofore gave a deposition in this case. I lived at Salmon City during the year 1922 until about the middle of October

that year. During that period I was in charge of the wool warehouse involved in this case. I had the keys and conducted the warehouse business the same as I had always done. I had no other business since about January that year. There was in the wool warehouse in 1922 a lot of the 1921 wool clip which had not been sold in 1921. It was the poorer grade of wool. I represented the owners of that wool in selling it. I found a buyer at what I thought was a satisfactory price and then corresponded with the owners and got authority to sell it. Much of that wool was mortgaged to the Citizens National Bank. I kept a book of the wool stored, received and shipped out by me in the wool warehouse during the year 1922. Book marked Plaintiffs' Exhibit No. J is the book which I refer to. (Whereupon plaintiff's Exhibit No. J was admitted in evidence.) It contains the names of those who stored wool with me in this warehouse and shows the amount of wool stored and where I sold the wool it shows what I received for it. On page 2 of this book it shows that J. O. Grubb stored 2 bags. They were marked J. They contained 325 pounds, which were sold at 21c per pound. In most cases it shows the date that the wool was received. On page 37 it shows that Charles Carlson brought in 27 bags; they weighed 8081 pounds and were unloaded on July 2, 1922. On page 43 it shows that L. Ramey, that is Louis F. Ramey, who gave a deposition in this case, stored 3 bags weighing 948 pounds. The

date is not given. On page 41 it shows that Steve Mahaffey stored 54 bags branded X, gross weight 16556 pounds. This was unloaded at the warehouse on July 8, 1922. On the same day Mrs. Jim Mahaffey stored 29 bags, gross weight 9394 pounds (p. 52). On page 55 it shows that H. G. Anderson stored 7 bags on July 10, 1922, and that this pool was mortgaged to the Citizens National Bank. On pages 115 to 119, inc., is a list giving the names of the persons or parties who paid me commission for storage on wool commencing on March 4th and ending on September 3, 1922. The list contains the names of about 142 parties who paid various sums from a few cents to over $80 each, making a total of $1,017.86 received by me as revenue from the wool warehouse during the period from March 4th to September 3, 1922. The book (Plaintiffs' Exh. No. J) shows the amount of wool stored by each of these parties and in most cases the date when the wool was stored.

"Plaintiffs' Exhibit No. L is a check issued by me on May 20, 1922, drawn on the Citizens National Bank of Salmon, the defendant in this case, and payable to the order of 'Yourselves' for $2,291.79. It is signed "Lemhi Co. Wools by G. B. Quarles, Agt." It is stamped 'The Citizens National Bank of Salmon, Idaho, paid May 20, 1922.' That money was paid to the Bank as mortgagee of 1921 wool stored in the wool warehouse which I sold in 1922 as heretofore stated for the growers. I either knew

that the Bank held a mortgage on the wool or the growers gave me orders to pay the money to the Bank. I loaded all of that wool out of the warehouse and handled the sale and shipment of it and where the growers had not given orders to pay it to the Bank or the Bank didn't have a mortgage, I sent my checks for the wool to the growers. The wool was sold in May, 1922.

"Plaintiffs' Exhibit No. K is my letter to the Bank transmitting the check referred to above. Exhibit No. K reads as follows:

" 'Salmon, Idaho, May 20th, 1922

Citizens National Bank,
Salmon, Idaho.
Gentlemen:

Herewith is a check on you and to your order for twenty-two hundred ninety-one & 79/100 dollars for the use and benefit of the following named parties with advice to them as to the receipt by you and application of the same.

Names	Amount
Jas. G. England	$ 2.00
S. A. Ball	84.63
Wm. Olsmer	35.70
E. W. Dillon	23.73
W. L. Dowton	70.56
Curtis Moore	123.27
J. A. Robbins	12.00
Andrew A. Lish	10.00
James Mahaffey	502.95

S. Sims	29.19
C. F. Snyder	21.00
W. S. Barce	353.22
S. A. Mahaffey Jr. (on note)	434.50
A. R. Nichols	120.75
A. D. Cook	21.00
Fred Abbey	4.40
Bear & Martin	10.50
Ed. Mulvania	432.39
	$2,291.79

from wool sales.

Very sincerely,

G. B. Quarles'

"I had some correspondence with the Bank during May and June, 1922, about the sale of this wool and the accounts of the different growers for whose wool I made remittances to the Bank. Plaintiffs' Exhibit No. M are letters received by me from the Bank. They are signed by G. W. Davis as Cashier and are dated May 24, May 29, June 2, June 6 and June 13, 1922, respectively. They are written on the letterhead of the Citizens National Bank of Salmon. The letter of May 24, 1922, reads as follows:

" 'CITIZENS NATIONAL BANK OF SALMON

Salmon, Idaho, May 24, 1922

Mr. G. B. Quarles,
Salmon, Idaho.
Dear Sir:

We have some of our customers statements of their wool unsold last year and we wish to call your attention to Curtis Moore especially as your statement to him shows that he had 1532 pounds and this at 22c would be over 300 dollars. You gave us for him about $123.00. Please explain this difference to us at once as Mr. Moore wants the difference. He also says he never received a statement of this last sale from you and we expect that you will furnish each customer or us with a statement of the pounds sold. You told the writer that you were going to send these direct.

D/D Yours truly,

G. W. Davis, Cashier'

"I wrote the Bank again on June 7, 1922, with reference to the accounts of the growers and explaining items which the Bank had inquired about. Plaintiffs' Exhibit No. N is that letter. This reads as follows:

" 'Salmon, Idaho, June 7th, 1922.

Citizens National Bank,
Salmon, Idaho.
Gentlemen:

Kindly see my letter to you dated May 20th, 1922,

enclosing check for $2,291.79, thereafter I enclosed you checks for Curtis Moore for $190.26 and for W. L. Dowton for $78.81. The wool of these several parties was figured at the weights at time of grading, July, 1921. Shipments were made in May, 1922, wool was weighed and paid for at the time of shipment, there was a shrinkage in the lot of wool including the wool of these above and others amounting to 753 pounds. There was therefore a shrinkage of 3½% on each parties wool and the wool of the parties for whom I paid you was over figured that amount without shrinkage.

Parties Name	Amount paid	Original weight
Jas. G. England	$ 2.00	10
S. A. Ball	84.63	413
Wm. Oltmer	35.70	176
E. W. Dillon	23.73	118
W. L. Dowton	149.37	754
Curtis Moore	313.63	1,532
J. A. Robbins	12.00	60
Andrews A. Lish	10.00	50
James Mahaffey	502.95	2,443
S. Sims	29.19	145
C. F. Snyder	21.00	105
W. S. Barce	353.22	1,719
S. A. Mahaffey, Jr.	434.50	2,118
A. R. Nichols	120.75	589
A. D. Cook	21.00	103
Fred Abbey	4.40	27

Bear & Martin	10.50	52
Ed Mulvania	432.39	2,108
	$2,560.86	12,532

Shrinkage on above wools was 438 pounds and there has been an over payment of $96.36 which amount I ask that you kindly refund and deposit to the account of 'Lemhi County Wools, G. B. Quarles, Agent.' Kindly advise me you have done this that this account may not become overdrawn.

Yours very truly,

G. B. Quarles'

This shrinkage was not discovered until the error in the accounts of C. W. Moore and W. L. Dowton were found."

"Plaintiff's Exhibit H attached to the deposition of H. G. King is a check for $200.00 dated May 19, 1922, payable to M. J. King, the wife of H. G. King. It was issued by me on the Citizens National Bank, which is signed like the other checks—Lemhi Co. Wools by G. B. Quarles, Agt. That was for 1921 wool which I sold in May, 1922, for the growers, and I had an order to pay the money to M. J. King. The other check attached to Mr. King's deposition is dated May 20. It is like the first one, payable to M. J. King, but is for $69.25. It was also for 1921 wool which I sold in May, 1922, for the grower. Mrs. King either had a mortgage on this wool or had

some interest in it and I was ordered to pay it to her. I gave the checks to H. G. King, I believe at his office down town. He was never at the warehouse so far as I know during 1922."

Plaintiffs' Exhibit J, being the book kept by Mr. G. B. Quarles showing the wool stored at the wool warehouse during 1922 and other exhibits of both plaintiffs and defendant not set out in full in this statement may be sent by the Clerk of this Court to the Clerk of the Circuit Court of Appeals for examination on appeal by the members of that Court and need not be printed as part of the record, but reference thereto may be made in the briefs and argument of counsel with the same force and effect as if printed as part of the record.

STIPULATION FOR SETTLEMENT OF STATEMENT OF EVIDENCE

It is hereby stipulated and agreed that the foregoing Statement of Evidence is true and correct and may be forthwith settled by the Court as provided by the Equity Rules.

Dated this 17th day of August, 1928.

RICHARDS & HAGA
Attorneys for Plaintiff and Appellants
JONES, POMEROY & JONES
E. H. CASTERLIN
Attorneys for Defendants and Appellees

ORDER SETTLING STATEMENT OF EVIDENCE

The time for settling and certifying the proposed Statement of Evidence of the Appellants, lately filed herein, having been duly extended by stipulations of the parties and by orders of the Court to and including this date and all amendments proposed by the Appellees which should be allowed, having been embodied in said Statement of Evidence as the same now stands and the parties having stipulated in writing that the foregoing statement as the same now stands is the true and correct Statement of the Evidence in said cause.

IT IS THEREFORE ORDERED that the Statement of Evidence as the same now stands, amended as aforesaid, be and hereby is settled as the true Statement of Evidence in this cause upon all issues raised by the Assignments of Error and the same is hereby certified accordingly, by the undersigned, the Judge who presided at the trial of said cause, and,

IT IS FURTHER ORDERED that the said Statement of Evidence as settled and certified be filed by the Clerk of this Court and made a part of the record in said cause. Dated this 1st day of September, 1928.

CHARLES C. CAVANAH
District Judge

Endorsed: Filed Sept. 1, 1928.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

No. 628

MEMORANDUM DECISION

March 5, 1928

Richards & Haga, attorneys for Plaintiffs.

Jones, Pomeroy & Jones and E. H. Casterlin, attorneys for Defendant.

CAVANAH, DISTRICT JUDGE:

The defendant, Citizens National Bank, on April 15, 1922, instituted an action in the state court against G. B. Quarles to recover on a promissory note for $5,456.99, and about April 17, 1922, attached a wool warehouse, then owned and in the possession of Quarles, by having the sheriff serve upon him the necessary papers required by the statute. Thereafter Quarles appeared in the action and moved to discharge the warehouse from the lien of the attachment. The court denied the motion, and on Oct. 2, 1922, judgment by default was entered against him. Execution was issued on the judgment on January 15, 1923, and pursuant thereto the warehouse was, on January 22, 1923, sold to the bank, who immediately took possession and ever since has retained exclusive control thereof. The warehouse is situated upon the right of way of the Gilmore & Pittsburg Ry. Co., who, on May 1, 1923, leased to the bank the site upon which it is. On May 29, 1922, Quarles being indebted in the

sum of $4,490.88 to the plaintiffs, who were then minors and his children by a former wife, executed to them his note. This indebtedness arose out of property which they inherited from their mother's separate property and which Quarles had possession of. McCaleb, a brother of Quarles' former wife, when the plaintiffs were over the age of fourteen years, petitioned the state court to appoint him guardian ad litem for the purpose of bringing suit on the note against Quarles, and stating therein that the reason for the suit was to secure judgment within sixty days of the date of the bank's attachment, so that the plaintiffs might share in the proceeds of the property attached. He was appointed such guardian, and suit was by him started. Quarles on the same day appeared by demurrer, which was overruled, and, refusing to plead further, judgment by default was entered. Desiring to give his children security for the payment of the judgment, he, on June 1, 1922, executed a chattel mortgage to McCaleb covering the warehouse and other property, which was, by McCaleb, foreclosed on Sept. 21, 1922, by affidavit and notice of sale (Sec's. 6380 and 6384 Comp. Stats. of Idaho), and the warehouse was, on Sept. 30, 1922, sold to Rose Loring Quarles, the step mother of plaintiffs, on her bid of $25.00. Thereafter Rose Loring Quarles, and her husband, G. B. Quarles, made and delivered a bill of sale to John and Virginia Quarles of all their interest in the warehouse.

At the time the attachment was levied the sheriff appointed H. G. King as custodian of the warehouse and left with him the key thereto. It seems that the custodian went to the warehouse and opened the door on one occasion with Mr. Rogers, who was associated with Mr. Bloomer, and who had supplies stored there. The custodian would allow those who had property stored there to go in. He says that he kept it locked when he was not present, and passed by it about three times every day when going to and from his home. No one, when he was acting as custodian, disputed his control. Since the warehouse was sold, in January, 1923, under the execution the bank has been in possession and operated it in storing wool for its customers. No attempt since it went into possession has been made to ouster it until this suit was instituted on July 7, 1926. The court, in the judgment under which the bank acquired title, expressly preserved to it all rights secured by the attachment. In the chattel mortgage, under which plaintiffs claim to have acquired title by foreclosure it is stated: "Nor does this mortgage waive the right of the judgment creditor of the said Quarles to share in the proceeds of the sale of any attached property attached by the bank." When the mortgage was noticed for foreclosure, the sheriff says that he appointed Mr. Havermann as custodian, and that his duties were subject and subsequent to those of King's, the custodian under the attachment. There is testimony that Quarles also, until October,

1922, when he left for California, at times removed wool from the warehouse since the attachment, and when he left he appointed Mr. Smith as his agent to store and remove wool and other goods therefrom. Smith never talked to Rose Loring Quarles about what he was to do, as Quarles made all the arrangements with him. He says that the sheriff, in January, 1923, placed another lock on the building and ousted him.

This suit is brought by plaintiffs, who have reached the age of majority, to secure a decree giving them possession of the warehouse, establishing the validity of the foreclosure proceedings, securing an accounting of the income of the property, foreclosing their mortgage, if any irregularity in the former proceedings appear, and adjudging the attachment of the defendant on the property void, thereby destroying defendant's title thereto. The parties agree that the warehouse is personal property, and therefore the case must be considered and determined under the evidence and principles of law relating to the attachment, foreclosure of chattel mortgages and sale of personal property.

The defendant bank first urges that the action is barred by the statute of Limitations of the state, and calls attention to Section 6611, which declares that an action for the specific recovery of personal property must be brought within three years. This statute is set in motion when a right of action has accrued, and there are parties competent to sue and

be sued, and before its operation should be suspended in favor of infants such disability must exist at the time the cause of action accrues. Therefore it will be applicable here only should it be held that the guardian ad litem has authority under the laws of the state to foreclose the mortgage. It will be observed that authority is granted to a guardian ad litem by Sections 6639, 6640 and 7855 of the state statutes, after being appointed by the court to prosecute or defend an action in any matter in which a minor is interested. McCaleb, who was appointed guardian ad litem for the plaintiffs to bring suit on the note against Quarles, had authority in that suit to accept additional security by way of mortgage for the judgment obtained. The foreclosure of the mortgage given in the suit in which he was appointed guardian, and when and how it should be foreclosed and what the mortgaged property should be bid in for, were matters within his authority as such guardian. Applying then the principle just stated to the testimony of Rose Loring Quarles, that she purchased the property at the foreclosure sale with her own money, and not with any funds of the plaintiffs, and for the purpose of making them a gift, which she thereafter made by bill of sale in September, 1925, it would seem that her right of action against the defendant accrued on January 22, 1923, when the property was sold under the execution to the bank, unless she bid the property in for the sole purpose and understanding that she was taking title

thereto for the benefit of the infants and to secure for them whatever rights they might have had under the mortgage, and in such case the claim of title having remained in her name in trust for the minor children until they became of age, the statute of limitations would not commence to run against them until October 13, 1924, and July 26, 1925, when they reached their majority. But the defendant further strenuously urges that Rose Loring Quarles, under the evidence, was a trustee of an express trust within the meaning of Section 6636 of the Idaho Compiled Statutes, which authorizes a trustee of an express trust to bring an action without joining with him the person for whose benefit the action is prosecuted, and one with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, and therefore the statute began to run against her as such trustee on January 22, 1923, and by reason thereof the minors are barred because of the failure of the trustee to sue for the recovery of the property within three years.

I find myself unable to adopt this contention and apply this statute to the facts as disclosed in this record, for the trust referred to in the statute must be "an express trust", that is, one created by express terms in a deed, will or other writing. Jones v. Byrne, 149 Fed. 457; Ames v. Howes, 13 Ida. 756, 93 Pac. 35. There was no contract made between Rose Loring Quarles and anyone concerning

the holding of the property for the benefit of the minors. All that she did was to bid in the property for them, and held it for their use and benefit.

Defendant further asserts that even though it should be held that the action is not barred by the statute of limitations, and that the plaintiff's mortgage was legally foreclosed, yet whatever lien they may have upon the property is subsequent and subject to the attachment lien of the defendant, as the attachment was levied prior to the time the mortgage was foreclosed and the property sold thereunder. This contention calls for a consideration of the record as to what steps were taken in the attachment and foreclosure proceedings. If the attachment proceedings were in accordance with the statute of the state, then it follows that the plaintiffs cannot recover, for the attachment was levied upon the warehouse on April 17, 1922, and the foreclosure sale was subsequent thereto, on Sept. 30, 1922.

Subdivision 5 of Section 6784, Idaho Compiled Statutes, which is involved here, provides that: "Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such creditors or other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the creditors or other personal property in his possession or under his control, be-

longing to the defendants, are attached in pursuance of such writ." This statute is clear as to how personal property not capable of manual delivery is to be attached, as it says that such property must be attached by leaving with the person owing such debt or having in his possession or under his control such property, or with his agent, a copy of the writ and a notice that the same is attached in pursuance of the writ. The warehouse is situated upon land of the railroad, and being personal property was not capable of manual delivery and comes within the statute. The law provides two ways in which personal property is to be attached. Where it is capable of manual delivery it is levied upon by taking it into custody. No great strictness of form in such such case is essential as against the defendant in the attachment proceedings, but if the property is suffered to remain in the possession of the debtor, the levy, while good as against him, is not sufficient as against purchasers in good faith, nor does it operate to defeat subsequent liens. To be sufficient where property is capable of manual delivery the custody must be such that the officer assert his control and power over it. The warehouse in question not being capable of manual delivery would not come within this principle of law. But the manner of attaching it is governed by the expression in the statute that personal property, not capable of manual delivery, must be attached by leaving with the debtor, or with his agent having control of such property, a copy

of the writ and a notice that the property in his possession or under his control is attached in pursuance of the writ. Such property is as much liable to attachment as if it was in the possession of a third person, and a contrary construction would exempt it from attachment. It is universally held that heavy and unmanageable articles, and growing crops, crops, which are personal property not capable of manual delivery, may be properly attached by the officer not taking them into custody if he complies with the provisions of the statute. The service of a copy of the writ and notice upon the debtor, or his agent in control of such property, that the property is attached meets the requirements of the statute. The requirements for attaching personal property not capable of manual delivery are similar to the requirements for attaching real property. Rudolph v. Sanders, 111 Cal. 233, 43 Pac. 619.

The record discloses that the sheriff complied with the requirements of the statute in levying upon the warehouse under the writ of attachment, as he served upon the debtor, Quarles, in the suit brought by the bank against him, a copy of the writ of attachment and notice that the property then in his possession was attached in pursuance of the writ, and filed the writ with the County Recorder of the county, which was notice to all that the attachment was issued, and then made his return which was filed in the proceeding, reciting that: "I further certify that I attached that certain building known as the wool

warehouse, located on the right of way of the Gilmore & Pittsburgh Railroad Company, south of the tracks of said Company and Westerly from the depot, in Salmon, Lemhi County, Idaho, the same being designated by plaintiff as personal property, levied upon as such and placed in the hands of H. G. King, as custodian." At the time he made the attachment he appointed Mr. King custodian, and gave him the key to the warehouse. King had occasion to go and open it for the purpose of allowing Mr. Rogers to remove some property stored there, and also kept in touch with it daily as he passed by it. Thereafter, when the sheriff, in September, appointed Mr. Havermann custodian in the foreclosure proceedings, he says it was subject to the attachment, and placed the bank in possession when it was sold under the writ of execution.

The suggestion is made that the sheriff abandoned the attachment. There appears in the record no affirmative act or conduct of his indicating that he or the bank had abandoned the attachment; on the contrary, the acts of both himself and the bank show that they were from the time of the levy until the property was sold under execution continuing the attachment. The law does not presume or favor abandonment of the attachment, and before an attachment will be deemed to have been abandoned there must be some affirmative act or conduct of the sheriff or creditor showing a discontinuance thereof. The mere fact that Quarles or others were at times

permitted by the sheriff to remove property stored in the warehouse after the attachment was levied is not regarded as an abandonment of the attachment; nor did it discharge it where the levy is made upon personal property not capable of manual delivery and not consumable in the use. 6 C. J. 312; 23 C. J. 471. All parties who were interested in or had anything to do with the property knew and realized that the bank had attached it.

The bill contains the allegation that on October 16, 1922, Quarles was adjudged a bankrupt in this court, and thereafter, on February 28, 1924, received his discharge in bankruptcy. As those proceedings were not started until more than four months after the attachment lien was created, the attachment was not discharged or affected thereby.

Having thus reached the conclusion that the guardian had legal power and authority to accept and foreclose the mortgage subject to the prior attachment lien of the defendant, it does not become important as to whether or not the bill contains two inconsistent causes of action. However that may be, the scope of plaintiffs' bill, wherein they pray that the title to the property be quieted in them, and in the event that is not done, for a decree foreclosing their mortgage, are not inconsistent prayers for relief, but merely a statement of prayer in alternative form. This relief is in accordance with the provisions of Equity Rule No. 25, Subdv. 5, which provides that the bill should contain "a statement of and

prayer for any special relief pending the suit or on final hearing which may be stated and sought in alternative forms." This rule has been construed and the same conclusion reached in Boyd, et al., v. New York & H. R. R. Co., et al, 220 Fed. 174; Simpkins Fed. Practice, p. 550. It seems therefore clear that the plaintiffs have the right to pray at the same time in their bill that the proceedings relating to the foreclosure of their mortgage be held legal, and in case that is not done that their mortdage may be foreclosed.

It having been concluded that the defendant's attachment was legally levied, and constituted a prior lien against the warehouse to plaintiffs' claim, a decree for the defendant will accordingly be entered.

Endorsed: Filed March 5, 1928.
W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

DECREE OF DISMISSAL OF BILL

This cause having come on to be heard on the 27th day of October, 1927, upon pleadings and proofs, and Richards & Haga having been heard on the part of the plaintiffs, and E. H. Casterlin and Jones, Pomeroy & Jones on the part of the defendant, and due deliberation having been had,

IT IS ORDERED, ADJUDGED AND DECREED that the said Bill of Complaint herein be and the same is hereby dismissed, with costs to the defendant to be taxed, in the sum of $54.55.

DATED, this 9th day of March, 1928.

CHARLES C. CAVANAH
United States District Judge

Endorsed: Filed March 9, 1928.
W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

PETITION FOR APPEAL

The above named plaintiffs, John Vernon Quarles and Hope Virginia Finn, conceiving themselves aggrieved by the decree entered in the above entitled cause on the 9th day of March, 1928, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and your petitioners pray that this appeal may be allowed and that citation may issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree is based, duly authenticated, may be sent to the

United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 6th day of June, 1928.

RICHARDS & HAGA
Solicitors for Plaintiffs

ORDER ALLOWING APPEAL

AND NOW, to-wit: on the 8th day of June, 1928, IT IS ORDERED that the foregoing petition be granted and that an appeal be allowed as therein prayed, upon petitioners filing a bond for costs on appeal, as required by law, in the sum of $200.00.

CHARLES C. CAVANAH
District Judge

Endorsed: Filed June 6, 1928.

W. D. McREYNOLDS, Clerk.
By VERNA THAYER, Deputy.

(Title of Court and Cause)

ASSIGNMENT OF ERRORS

AND NOW COME The plaintiffs, John Vernon Quarles and Hope Virginia Finn, and, having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree

made and entered in the above entitled cause on the 9th day of March, 1928, say that said decree and the decision made and filed in said cause on the 5th day of March, 1928, are erroneous and unjust to these plaintiffs, and particularly in this:

I. Because the Court erred in holding and deciding that the lien of defendant under its attachment was prior and superior to the lien of plaintiffs' mortgage.

II. Because the Court erred in holding and deciding that the warehouse involved in this action is personal property not capable of manual delivery.

III. Because the Court erred in holding and deciding that the provisions of subdivision 5 of Section 6784 of the Compiled Statutes of Idaho, 1919, apply to the attachment of the warehouse involved in this action.

IV. Because the Court erred in not holding and deciding that the warehouse involved in this action is personal property capable of manual delivery.

V. Because the Court erred in not holding and deciding that the provisions of subdivision 3 of Section 6784, Compiled Statutes of Idaho, 1919, apply to the attachment of the warehouse involved in this action.

VI. Because the Court erred in holding and deciding that the warehouse involved in this action

could be attached without taking the same into possession.

VII. Because the Court erred in holding and deciding that the pretended attachment of the warehouse involved in this action was valid and effectual for any purpose.

VIII. Because the Court erred in dismissing plaintiffs' bill of complaint herein.

WHEREFORE, the said plaintiffs pray that the decree entered herein be reversed and set aside with directions to the District Court to enter a decree decreeing plaintiffs to be the owners of said warehouse and determining the damages which they are entitled to recover.

RICHARDS & HAGA
Solicitors for Plaintiffs
Residence: Boise, Idaho

Endorsed: Filed June 6, 1928.
W. D .McREYNOLDS, Clerk.
By VERNA THAYER, Deputy.

(Title of Court and Cause)

ADDITIONAL ASSIGNMENT OR ERRORS

COME NOW the plaintiffs John Vernon Quarles and Hope Virginia Finn, and having on June 6,

1928, filed herein their petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above entitled cause on the 9th day of March, 1928, and having with said petition filed certain Assignment of Errors, add thereto the following Assignment of Error to be numbered and to read as follows:

IX. Because the Court erred in holding and deciding that H. G. King had such custody and control of the warehouse involved in this action as is required by the statutes of the State of Idaho in order to constitute a legal and valid attachment of such property.

RICHARDS & HAGA
Solicitors for Plaintiffs
Residence: Boise, Idaho

Endorsed: Filed June 8 ,1928.

W. D. McREYNOLDS, Clerk.
By VERNA THAYER, Deputy.

(Title of Court and Cause)

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, That we, John Vernon Quarles and Hope Virginia Finn, as principals and AMERICAN SURETY

COMPANY OF NEW YORK, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to transact surety business in the State of Idaho, as surety, are held firmly bound unto The Citizens National Bank of Salmon, Idaho, a corporation, the above named defendant, in the penal sum of TWO HUNDRED and NO/100 ($200.00) DOLLARS, to be paid to said The Citizens National Bank of Salmon, Idaho, a corporation, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

SEALED with our seals and dated this 9th day of June, 1928.

THE condition of this obligation is such, that whereas the above named John Vernon Quarles and Hope Virginia Finn, the above named plaintiffs, have prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the decree entered against them in this cause in the said United States District Court for the District of Idaho, Eastern Division, on the 9th day of March, 1928, all of which is more particularly set forth in the petition for appeal and the assignment of errors filed in said cause.

NOW, THEREFORE, the condition of this obligation is such that if the above named plaintiffs

John Vernon Quarles and Hope Virginia Finn, appellants on said appeal, shall prosecute their said appeal to effect and answer all damages and costs, if they fail to sustain their appeal, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF the said Principals have hereunto caused their names to be subscribed by their Solicitors of record and the said AMERICAN SURETY COMPANY OF NEW YORK has caused this undertaking to be executed as Surety.

Dated this 9th day of June, 1928.

JOHN VERNON QUARLES
HOPE VIRGINIA FINN
Principals

By Richards & Haga
Solicitors

AMERICAN SURETY COMPANY
OF NEW YORK
By A. J. Gamble
Its Attorney-in-Fact
Surety

(Seal)

Countersigned at

Boise, Idaho,

By O. O. Haga

The foregoing bond is hereby approved.

Dated this 11th day of June, 1928.

CHARLES C. CAVANAH
District Judge

Endorsed: Filed June 11, 1928.

W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

CITATION

UNITED STATES OF AMERICA)
)ss.
DISTRICT OF IDAHO)

TO THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a corporation, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Eastern Division, wherein John Vernon Quarles and Hope Virginia Finn, are appellants, and you are appellee, to show cause, if any there be, why the

decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS, the Honorable CHARLES C. CAVANAH, United States District Judge for the District of Idaho, this 8th day of June A. D. 1928, and of the independence of the United States, the one hundred and fifty-second.

CHARLES C. CAVANAH
District Judge

ATTEST:

(Seal)

W. D. McREYNOLDS, Clerk.

Service of the foregoing citation and receipt of a copy thereof, is hereby admitted this 12th day of June, 1928.

T. D. JONES

JONES, POMEROY & JONES
Solicitors for The Citizens National Bank of Salmon, Idaho, a corporation, defendant and appellee.

Endorsed: Filed June 12, 1928.

W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

PRAECIPE

TO W. D. McREYNOLDS, CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare the record on appeal of the plaintiffs John Vernon Quarles and Hope Virginia Finn, who have taken an appeal in the above entitled cause from the decree of dismissal in said cause made and entered on the 9th day of March, 1928, such record to consist of the following:

1. Bill of complaint as amended.
2. Answer of defendant as amended.
3. Statement of evidence under Equity Rule No. 75 as hereafter settled and allowed by the Court.
4. Decision filed March 5, 1928.
5. Decree of dismissal made and entered March 9, 1928.
6. All papers filed in connection with this appeal, to-wit: Petition for appeal; assignment of errors; order allowing appeal; bond on appeal; citation, and this praecipe, together with your certificate.

In preparing the above record you will please omit the title of all pleadings, except the bill of complaint, inserting in lieu thereof "Title of Court and Cause" followed by the name of the pleading or instrument. You will please omit the verification of all pleadings, inserting in lieu thereof whenever the pleading is verified, the words "Duly Verified."

Dated this 12th day of June, 1928.

RICHARDS & HAGA
Solicitors for Plaintiffs and
Appellants John Vernon Quarles
and Hope Virginia Finn

STATE OF IDAHO)
)ss.
COUNTY OF ADA)

CHAS. H. DARLING, being first duly sworn, on oath, deposes and says: That he is a citizen of the United States and of the State of Idaho, over the age of 21 years; that on the 12th day of June, 1928, he deposited in an envelope in the Post Office at Boise, Idaho, securely sealed and with ordinary postage prepaid thereon one true and correct copy of the foregoing praecipe directed and addressed to Messrs. Jones, Pomeroy & Jones, the Solicitors for the defendant in the above entitled cause at Pocatello, Idaho; Pocatello, Idaho, is the residence and Post Office address of the said solicitors for the defendant and that there is regular communication by

United States Mail between the Post Office at Boise, Idaho, and Pocatello, Idaho.

CHAS. H. DARLING

Subscribed and sworn to
before me this 12th day of
June, 1928.

H. M. JEFFREY
Notary Public for Idaho
Residence: Boise, Idaho

(SEAL)

Endorsed: Filed June 12, 1928.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

CLERK'S CERTIFICATE

I. W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 119, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $148.30, and that the same has been paid by the appellants.

Witness my hand and the seal of said Court this 31st day of October, 1928.

W. D. McREYNOLDS, Clerk

(SEAL)

No. 5624

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN VERNON QUAYLES AND HOPE VIRGINIA FINN, *Appellants,*

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, *Appellee.*

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Idaho; Southern Division

RICHARDS & HAGA and
CHARLES D. TARLING,
Residence: Boise, Idaho,
Solicitors for Appellants.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN VERNON QUARLES AND HOPE VIRGINIA FINN, *Appellants,*

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, *Appellee.*

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

---

RICHARDS & HAGA and
CHARLES H. DARLING,
Residence: Boise, Idaho,
Solicitors for Appellants.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN VERNON QUARLES AND HOPE VIRGINIA FINN, *Appellants,*

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, *Appellee.*

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

---

STATEMENT OF THE CASE

This is a suit in equity brought by the appellants, John Vernon Quarles and Hope Virginia Finn, citizens and residents of the State of California, as plaintiffs in the Court below, against the Citizens National Bank of Salmon, Idaho, as defendant. The plaintiffs were minors when the acts set forth in the complaint and

answer happened and were performed, but had reached the age of majority when this action was commenced.

The bill of complaint alleges that sometime prior to the 31st of May, 1922, one G. B. Quarles, who is shown by the evidence to be the father of plaintiffs, was indebted to the plaintiffs, who were then minors, in the amount of about $4,490.88, and that for the purpose of protecting the plaintiffs in their property rights the District Court of Lemhi County, Idaho, on May 31, 1922, appointed one H. L. McCaleb as guardian *ad litem* of the said plaintiffs for the purpose of prosecuting an action in their favor against said G. B. Quarles; that said McCaleb as guardian *ad litem* prosecuted an action on behalf of plaintiffs against the said G. B. Quarles and that judgment was entered in the District Court of Lemhi County, Idaho, in his favor as such guardian *ad litem* and against said G. B. Quarles, for $4,490.88. It is then alleged that after the entry of said judgment, and about the 1st of June, 1922, said G. B. Quarles being unable to pay and discharge the judgment, and desiring to avoid execution being taken out against him, and desiring to secure the payment of the judgment, made and delivered to said McCaleb as guardian *ad litem* for the plaintiffs a chattel mortgage covering, among other things, a certain building known as the "Wool Warehouse" located on the right-of-way of the Gilmore & Pittsburgh Railroad in Salmon, Idaho. A copy of the chattel mortgage is attached to the complaint and the same shows that it was duly filed for record in the office of the County Recorder of Lemhi County, Idaho, on June 1, 1922. It is then alleged that about the month of September, 1922, said

McCaleb, acting in the interests of plaintiffs, but without their knowledge or consent, foreclosed the chattel mortgage in accordance with Sections 6380 to 6384 of the Idaho Compiled Statutes, which provide for the foreclosure of chattel mortgages by affidavit placed in the hands of the Sheriff and sale made by the Sheriff upon short notice; that the Sheriff obtained peaceable possession of this property and sold the same on September 30, 1922, at public sale to the plaintiffs, who were represented in the matter by Rose Loring Quarles; that she bid the property in for the sum of $25.00, and the Sheriff delivered her a bill of sale and that said Rose Loring Quarles thereupon took possession of said wool warehouse on behalf of the plaintiffs.

The evidence shows that Rose Loring Quarles is the second wife of G. B. Quarles; that the indebtedness upon which the suit by McCaleb as guardian *ad litem* against him is based was for sums advanced him by his deceased wife, the mother of the plaintiffs herein.

The complaint alleges that Rose Loring Quarles bid the wool warehouse in and purchased the same in the interest and for the use and benefit of the plaintiffs and for the purpose of protecting their property rights, the plaintiffs then, and for a long time thereafter, being minors; that prior to the commencement of the present suit Rose Loring Quarles duly assigned, transferred and set over to the plaintiffs all of her right, title and interest acquired under said sale in and to said wool warehouse and all rights to an accounting from the defendant for the use and occupation of the wool warehouse and for the reasonable rental value thereof; that plaintiffs have acquired and hold all right, title

and interest in the wool warehouse acquired by said Rose Loring Quarles and all right to receive and demand from the defendant a full and complete accounting for the use and occupation of the wool warehouse by the defendants and all rights to damages due from the defendant to said Rose Loring Quarles.

It is then alleged that on the 15th day of April, 1922, the defendant had commenced an action against G. B. Quarles in the District Court for Lemhi County, Idaho, and on the 17th day of April, 1922, the Sheriff of Lemhi County pretended to levy a writ of attachment issued in said cause on the wool warehouse; that the Sheriff pretended to appoint a custodian to take possession of said property, but that neither the Sheriff nor his custodian at any time took possession or control of the wool warehouse, and that the wool warehouse was at the time of the pretended levy of attachment, and for upwards of five months thereafter continued to be and remain in the possession of G. B. Quarles, who used the same in his business and collected the rent and income therefrom, and at no time did the Sheriff or his deputy or custodian in said action or under said writ of attachment take possession or control of the said wool warehouse, and that the attachment was, under the laws of the State of Idaho, wholly void and ineffectual and no lien, right or interest was ever acquired by the said Citizens National Bank under said pretended attachment.

It is then alleged that on October 2, 1922, the District Court of Lemhi County, Idaho, entered judgment in said action in favor of the Citizens National Bank and against G. B. Quarles for about $5,000.00. About

January 15, 1923, the Citizens National Bank caused a writ of execution to be issued under its judgment against G. B. Quarles and the Sheriff of Lemhi County pretended to levy the writ of execution on the wool warehouse, notwithstanding that the same had been sold on September 30, 1922, to the plaintiffs and that the Citizens National Bank caused the warehouse to be sold under its writ of execution about the 12th of February, 1923, for the sum of $25.00, and that such sale, or pretended sale, under the writ of execution was absolutely void and ineffectual, and did not vest or transfer to the defendant Citizens National Bank any right, title or interest in or to the wool warehouse, but that notwithstanding such void and ineffectual sale, the defendant Citizens National Bank wrongfully took possession of the wool warehouse on or about February 12, 1923, and ever since said date has withheld possession from plaintiffs and from Rose Loring Quarles, and has kept and retained the use, enjoyment, rentals and income from such wool warehouse. The plaintiffs allege that the amount annually collected from said wool warehouse for rental, storage and other uses is upwards of a thousand dollars, and that the defendant has applied such moneys to its own use and benefit during the years 1923, 1924, 1925 and 1926, and has deprived the plaintiffs of the use and benefit of the wool warehouse to which they were entitled ever since the 12th of February, 1923.

As a second cause of action the plaintiffs adopt all of the preliminary allegations of their first cause of action, and further allege that they are the owners of the mortgage from G. B. Quarles to H. L. McCaleb

dated June 1, 1922, and that the indebtedness secured by this mortgage has not been paid and that the mortgage is a first and prior lien upon said wool warehouse, and that the same is due and that they have elected to foreclose the same.

The plaintiffs pray that it may be decreed that the pretended attachment of the defendant during April, 1922, was void and ineffectual and did not create any lien against the wool warehouse, and that it may be adjudged and decreed that the mortgage from G. B. Quarles to H. L. McCaleb as guardian *ad litem* of plaintiffs and dated June 1, 1922, was a first and prior lien on the wool warehouse and that the sale of the same on foreclosure of said mortgage on or about the 30th of September, 1922, vested in and transferred to Rose Loring Quarles good and valid title to the wool warehouse. They further pray that it may be adjudged and decreed that the pretended sale of the wool warehouse on or about the 12th of February, 1923, to the defendant the Citizens National Bank of Salmon under its writ of execution was void and ineffectual and transferred no right, title or interest to said Bank.

They further pray that it be adjudged that the possession of the defendant Citizens National Bank of the wool warehouse since February 12, 1923, has been wrongful and that the defendant wrongfully deprived the plaintiffs and Rose Loring Quarles of the use and enjoyment of said wool warehouse since said date, and that they may have an accounting of the rents, incomes and profits of the wool warehouse which the defendant has applied to its own use and that they may be adjudged and decreed to be the owners of the

wool warehouse, and that the defendant may be ordered and directed to deliver possession thereof to them, and that they may have a judgment against the defendant for the amount found due: to-wit, $1,000.00 a year from February 12, 1923.

The plaintiffs further pray that in the event the Court should for any reason find that the chattel mortgage from G. B. Quarles to H. L. McCaleb as guardian *ad litem* of the plaintiffs has not been legally foreclosed, that plaintiffs may have a decree of foreclosure of the said mortgage and a sale of the wool warehouse.

To this complaint the defendant filed its answer (Rec. pp. 24-44), the allegations and denials of which are not necessary to consider in detail on this appeal, except that the defendant alleges (Rec. pp. 29-31) that the writ of attachment issued out of the District Court for Lemhi County, Idaho, on or about the 17th of April, 1922, in the case of the Citizens National Bank of Salmon vs. G. B. Quarles was placed in the hands of the Sheriff of Lemhi County, Idaho, and that he levied said writ of attachment on the wool warehouse hereinbefore referred to, the same being personal property, and that he took the same into his possession under said writ and duly and regularly appointed a custodian to take possession of the property and that said custodian did take the same into possession and under his control, and held the same as custodian for the Sheriff under said attachment as provided by law, and continued to hold and exercise dominion and control over said property until the same was sold under

execution by the Sheriff to the defendant Citizens National Bank of Salmon.

The defendant also pleaded the statute of limitations as against the right of these plaintiffs to bring this action, and also by its answer challenged the title of the plaintiffs obtained under the foreclosure of their chattel mortgage by the guardian *ad litem*. The Trial Court, however, in its opinion (Rec. pp. 95-106) decided the issue of the statute of limitations against the defendant and held that the action is not barred (Rec. pp. 100, 101), and also held that the guardian *ad litem* had legal power and authority to accept and foreclose the mortgage (Rec. pp. 101-105).

The Trial Court, however, concluded (Rec. pp. 101-106) that the defendant's attachment was legally levied and constituted a prior lien against the warehouse to plaintiffs' claim, and, therefore, ordered a decree of dismissal in favor of the defendant (Rec. p. 106).

The sole question, therefore, presented by this appeal is whether the Trial Court was correct in determining that a valid levy was made upon the wool warehouse under the writ of attachment issued out of the District Court of Lemhi County in the suit of Citizens National Bank against G. B. Quarles on April 17, 1922.

It is admitted that the plaintiffs' rights in this property are based upon the chattel mortgage, Exhibit "A" to the complaint (Rec. pp. 20-23). This chattel mortgage is dated and filed for record *June 1, 1922*. The defendant's claim its levy on the wool warehouse under the writ of attachment was made on *April 17, 1922* (Sheriff's Return, Rec. p. 65), and that the levy of the writ of execution was not made until January 15,

1923 (Rec. p. 67), and sale under the execution was not made until January 22, 1923 (Sheriff's Return, Rec. p. 67). Accordingly, unless its writ of attachment was validly levied on April 17, 1922, the rights of the plaintiffs, obtained by their chattel mortgage, which was filed for record June 1, 1922, are prior to any rights of defendant under its levy and sale under execution in January, 1923.

Substantially all the evidence was taken by depositions.

SPECIFICATIONS OF ERROR

The errors relied upon or pertaining to the decision of the Trial Court upon the matter of the sufficiency of the levy under the writ of attachment are set forth in detail (Rec. pp. 108-111), and stated generally are as follows:

1. That the Court erred in holding and deciding that the lien of the defendant under its attachment was prior and superior to the lien of plaintiffs' mortgage.

2. That the Court erred in holding and deciding that the wool warehouse involved in this action is personal property not capable of manual delivery.

3. That the Court erred in holding and deciding that the provisions of subdivision 5 of Section 6784 of the Compiled Statutes of Idaho apply to the warehouse involved in this action.

The Court in its opinion (Rec. p. 101) decided that the above mentioned subdivision of the Idaho Statute which deals with the attachment of "debts and credits and other personal property not capable of manual

delivery" applied to the attachment of the wool warehouse, and it is appellants' contention that this property does not come within the classification to which the Court refers.

4. That the Court erred in not holding and deciding that the warehouse involved in this action is personal property capable of manual delivery.

5. That the Court erred in not holding and deciding that the provisions of subdivision 3, Section 6784, Compiled Statutes of Idaho, 1919, apply to the warehouse involved in this action.

6. That the Court erred in holding and deciding that the warehouse involved in this action could be attached without taking the same into possession.

7. That the Court erred in holding and deciding the pretended attachment of the warehouse involved in this action was valid and effectual for any purpose.

8. That the Court erred in dismissing plaintiffs' bill of complaint herein.

9. That the Court erred in holding and deciding that H. G. King had such custody and control of the warehouse involved in this action as is required by the statutes of the State of Idaho in order to constitute a legal and valid attachment of such property.

BRIEF OF THE ARGUMENT

Levy upon personal property under writ of attachment must be made by the officer actually seizing the attached property and taking it into his custody and possession and he must assume and maintain actual dominion and control over such property by such

means as will exclude all others from it. When this is not done, the levy is entirely void and ineffectual.

Section 6784, Idaho Compiled Statutes, Subdiv. 3.
6 C. J. pp. 223,226.
Hollister vs. Goodale (Conn.) 21 Am. Dec. 675.
Dutertre vs. Driard, 7 Cal. 549, 551.
Herron vs. Hughes, 25 Cal. 555, 563.
Smart vs. Sosey (Cal.) 193 Pac. 167, 168.
American Fruit Growers, Inc. vs. Walmstead, 44 Ida. 786, 793, 260 Pac. 168.
Green vs. Hopper (Nev.) 167 Pac. 23, 24.

The warehouse involved in this action is personal property capable of manual delivery within the meaning of subdivision 3 of Section 6784, Idaho Compiled Statutes, and a valid levy on attachment could only be made upon the same by the sheriff actually taking and maintaining custody and control thereof either by himself or by a deputy or custodian.

Crisman vs. Dorsey (Colo.) 21 Pac. 920, 922.
Throop vs. Maiden (Kan.) 34 Pac. 801.

ARGUMENT

The only question involved on this appeal is the validity of the attachment of the wool warehouse. The plaintiff alleges (Rec. p. 10) that the same is personal property, and the defendant in its answer (Rec. p. 29) concedes that the wool warehouse is per-

sonal property, and such was the view of both parties throughout the trial, and the Trial Court so regarded the property in his decision (Rec. p. 98). We are, therefore, concerned only with those statutes of the State of Idaho which govern the attachment of personal property. The question is covered by Section 6784 of the Compiled Statutes of Idaho, 1919, which provides that:

> "The Sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in Section 6782 be not given, as follows:
>
> * * * * * * * *
>
> "3. Personal property capable of manual delivery must be attached by taking it into custody.
>
> * * * * * * * *
>
> "5. Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control belonging to the defendant are attached in pursuance of such writ."

It was defendant's theory when the attachment was levied and plaintiffs' theory throughout this case that the warehouse could only be validly attached by compliance with subdivision 3 above mentioned, and that in so doing it was necessary for the Sheriff to take

actual physical possession of the warehouse either by himself or by a duly appointed custodian. This in fact seems to have been the defendant's theory upon the trial also, as shown by its proof and by the allegations of the answer (Rec. pp. 29-31) wherein it is alleged that the Sheriff did take the warehouse into his possession and did appoint a custodian who continued in possession and control thereof until the property was sold under execution by the Sheriff.

The defendant in its depositions attempted to show that the property had been placed in charge of one H. G. King as custodian immediately upon the pretended levy of writ of attachment on April 17, 1922. This is the recital contained in the Sheriff's return on sale (Rec. p. 65). The testimony in the record, however, overwhelmingly demonstrates that Mr. King, the supposed custodian, never had any such actual custody or control of the warehouse as is required to perfect a valid attachment.

Rose Loring Quarles testifies (Rec. p. 46) that she was at the warehouse at various times all during the summer of 1922 and that G. B. Quarles was in possession at all times, that the warehouse was being used for wool storage, and that he was managing it. G. B. Quarles testifies (Rec. p. 50) that he built the warehouse at the time of the First Liberty Loan, and that ever since November 20, 1918, when he purchased the interest of one George H. Monk, he had exclusive possession of the warehouse until the foreclosure of the chattel mortgage about September 30, 1922. He testifies that the warehouse was not attached by the Sheriff, that he was at no time disturbed in his possession

during the year 1922 up to the time of the Sheriff's sale on the foreclosure of the chattel mortgage, that no one ever demanded the keys to the property, and that he never saw anyone that claimed to be in possession of the property. He testifies (Rec. pp. 51, 85-93) that throughout the summer of 1922, both before and after the time when King is alleged to have been placed in possession of the warehouse as custodian, he (Quarles) handled many wool transactions from the warehouse, stored wool therein and conducted his business therefrom in the usual way. He produced in evidence his checks and receipts and books covering this period showing a sizeable volume of business, all carried on from the wool warehouse, and which could not have been done had the property been in the custody and possession of Mr. King or anyone else. His testimony is undisputed.

John Vernon Quarles, one of the plaintiffs and the son of G. B. Quarles, was in Salmon from June until September in 1922, and he testifies (Rec. pp. 58, 59) that he saw his father handling the business at the warehouse daily. He says that his father was in possession of it, and that the warehouse was being used by his father for receiving, storing and shipping wool, his father had the keys to the warehouse, and he saw his father unlock the warehouse on numerous occasions; he never saw anyone else with the keys in 1922, and never saw Mr. King or anyone else who claimed to be in possession thereof.

The testimony of H. G. King, the alleged custodian, was taken in two depositions, which appear in the record at pages 60 to 63, and 77 to 83.

In Mr. King's second deposition, which appears in the Record, pages 77 to 83, he admits that on May 18, 1922, or during the time when he is alleged to have been acting as custodian of the warehouse, he sold and delivered some wool to Mr. Quarles at the warehouse. He also says that during the summer of 1922, from the time he was appointed by the Sheriff, he did not receive any wool at the warehouse nor collect any rent. He further states that what he had intended to say when he testified in his first deposition that he had to go by the warehouse two or three times a day, was simply that in going back and forth from his home to town in his car he passed along Main Street, which is about two blocks from where the warehouse is situated, and that this distance is approximately 800 feet. This, he says, is what he meant by saying that he went to the warehouse every day, and, as he states (Rec. p. 79), this was the case during all the time he pretended to act as custodian. He further makes it clear (Rec. p. 83) that when he stated he did not find Quarles in charge of the warehouse in 1922, he was basing his statement upon his observation of the warehouse in these fleeting glimpses when he was driving along Main Street about 800 feet distant from the warehouse.

We believe that the testimony of Mr. King shows beyond any question that he had literally complied with the suggestion of the Deputy Sheriff that the duties would not be onerous. He was custodian in name only. He was obviously never in possession of the warehouse.

The fact that Mr. King never had any physical control, custody or possession of the property is further

shown by the testimony of W. C. Smith (Rec. pp. 73-75). Mr. Smith handled the warehouse in the fall of 1922 after Mr. Quarles left Salmon. He says that Mr. Quarles was in exclusive possession up until that time.

Mr. J. Z. Moore, the freight agent of the Gilmore & Pittsburgh Railroad Company, upon whose right-of-way the warehouse was located, also testifies (Rec. pp. 74, 75) that Mr. Quarles was in exclusive possession. This is also shown by the testimony of Louis F. Ramey (Rec. pp. 76, 77), who sold wool to Mr. Quarles at the warehouse during June and July, 1922, and who says that Mr. Quarles was in possession at that time, and that Mr. King was not there.

The fact that the Sheriff never had any possession or control of the wool warehouse during the time when the same is alleged to have been held under the writ of attachment is further shown by the testimony of Mr. T. J. Stroud, the Sheriff. Mr. Stroud testifies (Rec. pp. 67-73) that Mr. Kirtley, his deputy, now deceased, handled the matter. When asked if he had possession of the warehouse (Rec. p. 72), he says that he had possession through his keeper, Mr. H. G. King, but that he did not have actual possession himself.

We feel that on the record presented to this Court, there can be no question but that the assertion that the Sheriff took possession of the warehouse under the writ of attachment and placed a keeper or custodian in charge, is a mere fiction. The evidence, practically without dispute, shows that Mr. G. B. Quarles, the party against whom the writ of attachment was issued, remained in sole, exclusive and undisputed possession

until long after the execution of the chattel mortgage upon which the plaintiffs base their claim.

Such being the facts with reference to the actual situation regarding the custody and control of this personal property during the supposed period of attachment, it is appellants' contention that the levy was wholly ineffectual and void.

The principle of law governing this situation is well stated in 6 C. J. page 223:

> "It may be stated as a general rule that, in order to make a valid levy upon personalty, the officer executing the attachment must assume dominion over the property; he must not only have the property in view, but he must assert his dominion over it by such acts as would render him liable to an action for trespass but for the protection afforded him by process, or, as stated in some decisions, the officer must assume such control and possession over the property that the real owner may bring replevin."

It is, of course, doubtless true that the Sheriff could not be expected or required to actually remove this property from the place where he found it, but even in such case, the very purpose of an attachment requires that he do take it into his custody and that he retain such exclusive control over the same that the adverse party and all others are excluded therefrom.

Thus in 6 C. J. page 226, the rule is stated:

> "In the case of tangible property susceptible of manual seizure and delivery, and not in the pos-

session of a third person, such property must be actually seized and taken into possession by the levying officer; but while the possession must be actual in the sense that he takes the property from the immediate control of defendant and gives the officer control over it, so that he is able to touch or remove it, the officer may take and maintain the actual custody and control of the property without actually touching or handling the same, by such means as will exclude all others from the custody, or will give timely and unequivocal notice of the custody of the attaching officer."

In Hollister vs. Goodale (Conn.), 21 Am. Dec. 675, in discussing the meaning and purpose of an attachment with reference to personal property, the Court says:

"1. The word 'attach,' derived remotely from the Latin term 'attingo,' and more immeidately from the French 'attacher,' signified to take or touch, and was adopted as a precise expression of the thing; nam qui nomina intelligit, res estiam intelligit.

"The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. From both these considerations it is apparent that to attach is to take the actual possession of property. Hence, the legal doctrine is firmly established, that to con-

stitute an attachment of goods, the officer must have the actual possession and custody. It was laid down in these express words by Parsons, C. J., in Lane, et al. vs. Jackson, 5 Mass. 157, 163, and by Parker, C. J., in Train vs. Wellington, 12 Id. 495, 497. Nor is there, so far as my investigations have enabled me to discover, a single determination opposed to the preceding principle."

In Dutertre vs. Driard, 7 Cal. 549, 551, the Court says:

"Under our statutes, a levy on personal property capable of manual delivery must be made by taking the property into custody. If the execution creditor permits the property levied on to remain in the hands of the debtor, levy cannot operate to defeat subsequent executions."

In Herron vs. Hughes, 25 Cal. 555, 563, the Court says:

"In the language of the plaintiff's counsel: 'The levy of the constable was a fiction. The sale was a mockery and void. The constable made no levy because he had no possession of the property, nor even had sight of it. He made no sale because he could make none. Before he could sell, he must have levied; he must have had the right and possession and control of the property levied upon, after which he must have advertised and proceeded according to law, to their sale. The purchaser at

such a void sale could acquire no title and much less could a purchaser with full knowledge."

In Smart vs. Sosey (Cal.), 193 Pac. 167, 168, the Court says:

> "The nature of the possession and custody essential to the validity of an execution is indicated by the statement 'that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn, or taken by another, without his knowing it.' Freeman on Executions (3d Ed.), 262. In the instant case, the absence of the keeper abandoned the property to the control of the debtor. The articles were not locked up, they were not inventoried or marked, or seasonably removed. Under these circumstances, the levy could not have operated to defeat a subsequent execution. Dutertre vs. Driard, 7 Cal. 549."

The Supreme Court of the State of Idaho has uniformly taken the same view, that personal property can only be effectually levied upon under writ of attachment by actual seizure and possession by the Sheriff, and it is also required that he maintain such actual physical possession, either by himself or through his agency of a duly appointed keeper. In considering this question in American Fruit Growers, Inc., vs. Walmstad, 44 Ida. 786, 793, 260 Pac. 168, the Supreme Court of this State on October 16, 1927, announced the following principles:

"3. In case of tangible property, susceptible of manual seizure and delivery, such property must be actually seized and taken into possession by the levying officer, and that officer must take and maintain actual custody and control of the property by such means as will exclude others from such custody. (6 C. J. 226, 227; Crisman vs. Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664; Falk-Block Etc. Co. vs. Branstetter, 4 Ida. 661, 43 Pac. 571; Green vs. Hooper, 41 Nev. 12, 167 Pac. 23.)

"'A sheriff levying upon personal property left a portion thereof in an outbuilding, one of the debtors having the key. He assumed to levy upon them but did not take actual possession thereof. One 'J' agreeing to be responsible for all the property, it was left with him until day of sale. Held, that the levy was insufficient.' (Rix vs. Silknitter, 57 Iowa, 262, 10 N. W. 653.)

"In Keith vs. Ramage, 66 Mont. 578, 214 Pac. 326, it was held that the abandonment of attached property by the sheriff's keeper is an equivalent to a surrender of the property by the sheriff. It is requisite, therefore, that the levying officer take actual manual possession of the property attached, and that he maintain the same, either personally or through the agency of a keeper."

The Supreme Court of Nevada, construing the attachment statute of that state with reference to the attachment of personal property, identical with subdivision 3 of Section 6784 of the Compiled Statutes of

Idaho above mentioned, has well summarized the decisions of the Supreme Courts of a number of states in Green vs. Hopper, 167 Pac. 23, 24:

> "(4) It has been stated as a proposition of law, and such is well supported by authority, that it is the duty of the attaching officer to take the property attached into his possession; and the lien of such attachment, so far as subsequent purchasers and other creditors are concerned, is dependent upon the continuance of such possession. If, therefore, the officer abandons his possession, the lien will be ineffective as against such. Chadbourne vs. Sumner, 16 N. H. 129, 41 Am. Dec. 720; Sanford vs. Boring, 12 Cal. 539; Taintor vs. Williams, 7 Conn. 271; Nichols vs. Patten, 18 Me. 231, 35 Am. Dec. 713; Baldwin vs. Jackson, 12 Mass. 131; Sanderson vs. Edwards, 16 Pick. (Mass.) 144. In the case of Gower vs. Stevens, 19 Me. 92, 93, Am. Dec. 737, the rule is stated that:
>
> "'To constitute and preserve an attachment of personal property, by process of law, the officer serving such process must take the property and continue in possession of it either by himself, or by a keeper by him appointed for this purpose. It has never been understood that he could, consistently with the preservation of the lien, constitute the debtor his agent to keep the chattels attached. Except so far as authorized by special statute provision, he cannot leave such property with the debtor, without dissolving the attachment.'

> "To the same effect are the cases of Becker vs. Steele, 41 Kan. 173, 21 Pac. 169, and Loveland vs. Alvord Cons. Quartz Mng. Co., 76 Cal. 562, 18 Pac. 682."

Obviously Mr. King's connection with this wool warehouse was limited to an occasional and casual glance of the same as he traveled down Main Street of Salmon in his car, about 800 feet distant. It was the same as that of any other person driving along Main Street. The undisputed testimony shows that the other witnesses did not even know that Mr. King claimed to be custodian and we are wholly unable to understand how it could be concluded from these facts that there was any attempt to comply with the statute. Surely if there was such an attempt, it fell far short of the attainment of that sole, exclusive and notorious possession which the law requires. It is said in 6 C. J., page 223:

> "He must not only have the property in view, but he must assert his dominion over it by such acts as would render him liable to an action for trespass but for the protection afforded him by process, or, as stated in some decisions, the officer must assume such control and possession over the property that the real owner may bring replevin."

The Trial Court, however, took the view that the property involved in this action was attached by a compliance with the provisions of subdivision 5 of Section 6784, which provides:

> "Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts or having under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that debts owing by him to the defendants or credits or other personal property in his possession or under his control belonging to the defendant are attached in pursuance of such writ."

The Trial Court observes in his opinion (Rec. p. 103) that the Sheriff did attach the property in compliance with the provisions of the above quoted subdivisions by serving upon Quarles a copy of the writ of attachment and a notice that the property then in his possession was attached. He goes on further to say that the return of the Sheriff recites that the Sheriff placed the same in the hands of H. G. King as custodian. The Court then adds that at the time the Sheriff made the attachment he appointed King custodian and gave him the key.

The record is quite unsatisfactory as to the proof of the Sheriff having delivered a copy of the writ of attachment and the notice to Mr. Quarles, and is equally indefinite as to when, if ever, this was done. It will be noted that the Sheriff's return (Rec. p. 65) does not contain any mention of the service of such notice on Quarles, and Mr. Stroud, the Sheriff, admits (Rec. p. 70) that he does not know whether the notice was served.

However this may be, it is appellants' contention that since the record clearly shows that the Sheriff did

not take and retain actual custody or control of the property, either by himself or through the agency of any deputy or custodian, it must follow that there was no valid levy upon the property. The method of attachment prescribed in subdivision 3 of Section 6784 is the exclusive method whereby personal property such as this warehouse could be validly attached and levied upon. This is the method, and the only method prescribed for the attachment of tangible personal property. The provisions of subdivision 5 obviously apply to the attachment of debts, credits and other intangible personal property.

The Supreme Court of Colorado, in Crisman vs. Dorsey, 21 Pac. 920, 922, in discussing the provisions of the personal property attachment statutes of that state, similar to those of Idaho, has said:

> "The constable to whom the writ is delivered shall execute the same without delay, and, if the deposit be not made or the undertaking given as hereinbefore provided, then as follows: (1) Personal property, capable of manual delivery, shall be attached by taking the same into the custody of the constable; (2) Debts, credits, and other things in action, which are not capable of manual delivery, shall be attached by leaving with the person owing such debts, * * * or with his agent, a copy of the writ of attachment, etc. The meaning of the language of the section quoted is clear and unmistakable. Under it, it is the duty of the officer to execute the writ of attachment by taking personal property 'capable of manual de-

livery' into his custody. The nature of the property required to be taken into custody is clearly disclosed by the language of the section. All personal property, capable of manual delivery, must be taken into custody; that is, into the care and possession of the officer. Manifestly, within the meaning of this section, all chattels—all tangible personal property—is capable of manual delivery. The kind of property which is not capable of manual delivery, within the meaning of the statute, is as described in the second subdivision of this section. Such property consists of debts, credits, and other things in action. In other words, it is choses in action, as distinguished from tangible property or chattels. Under the section cited, it is clear that the writ of attachment can only be executed as to personal property which is capable of manual delivery by taking it into custody, and that within the meaning of the statute all personal property subject to attachment, except choses or things in action, is capable of manual delivery. *The fact that the property to be attached consists of bulky articles, difficult of removal, does not excuse the failure of the officer to take possession. To do this it may not be necessary to remove the property from the place in which it is found. Nevertheless it is incumbent upon him to do whatever may be necessary to take the property into custody. After the levy of the process the possession of the property should be his. It should be subject to his dominion and control. His possession must be exclusive. His dominion cannot be shared with the defendant. The effect of the levy must*

be to place the property in custodia legis. It cannot be held adversely to the Court or to the officer. The officer must be clothed with the indicia of ownership. The effect of the steps taken by him must be to charge the property with a lien, and create a special property therein, which will enable him at all times to protect and maintain his possession, and hold the property subject to the order of the Court until the attachment shall be dissolved. The provisions of the statute cited will admit of no other construction." (Our italics.)

In Throop vs. Maiden (Kan.), 34 Pac. 801, the Court says:

"To constitute a valid attachment of personal property, it is necessary for the officer, where he can obtain possession, to take the property into his cusody, and hold it subject to the order of the Court, and a levy by an officer who does not obtain actual control over the property levied upon is invalid. Civil Code, 198; Lyeth vs. Griffis, 44 Kan. 159, 24 Pac. Rep. 59. A manual seizure or a removal of the property by the officer is not always required, but he must assume the control of the property by virtue of the writ, and exercise such dominion over it as the character of the property will permit. *This dominion and control must be exclusive and continuous, and if the officer levying does not take and retain control by himself, or some one appointed for that purpose, the levy is invalid, against parties who subsequently obtain a lien on, or*

interest in, the property. It has been held that the custody should be such 'as will enable the officer to retain and assert power and control over the property, so that it cannot probably be withdrawn, or taken by another without his knowing it.' Drake, Attachm. 256. 'It is not essential that the property should be moved or touched. It is enough that the officer assumes control under the writ, and keeps someone in charge of the property. * * * The possession of the officer must not be temporary in its character. It must continue as long as it is desired that the attachment lien should remain in force. *An abandonment of the possession is an abandonment of the levy. The property must not be restored to the real or apparent custody of the defendant. The change of possession must be actual and substantial, and not merely formal or colorable.* It is not indispensable that the officer should be in visible possession every moment; but his connection with and control of the property ought, nevertheless, to be so continuous that it cannot probably be removed or disturbed without his knowledge.' Freem. Ex'ns, 262." (Our italics.)

The Trial Court in his decision (Rec. p. 102) states that the warehouse in question is not capable of manual delivery, and, therefore, reaches the conclusion that it must be attached pursuant to the provisions of subdivision 5, which mentions "other personal property not capable of manual delivery."

There is absolutely nothing in this record to indicate that this warehouse is of such a character that it is

not capable of manual delivery. Both parties and the Court concede that it is personal property and the record shows that it stood upon the right-of-way of the Gilmore & Pittsburgh Railroad Company, and that such real estate, accordingly, was not owned by the owner of the warehouse. "Manual delivery" as used in the attachment statutes does not mean delivery by hand or removal from the position in which the property was prior to the levy. All of the cases above mentioned show that this is not the meaning of the term, and as said in Crisman vs. Dorsey, supra, the fact that the property is bulky does not excuse the failure of the officer to take possession. It is necessary under such circumstances for the officer to do whatever may be necessary to take the property into his custody. It is too apparent for argument that it was not impossible for the plaintiff to take actual control and custody of the property in this case. In fact, that is what he stated in his return that he did, and there is no excuse shown for his failure to actually place and maintain a custodian or keeper in charge. The evidence clearly shows that the Sheriff made no effort whatever to invest himself with such custody and control as was easily possible and entirely to be expected under the circumstances.

The appellants believe that the foregoing cases, and particularly Crisman vs. Dorsey, demonstrate the fallacy of the Trial Court's conclusion that the provisions of subdivision 5 of Section 6784 apply to the attachment of property such as this. This property is neither a "debt" nor a "credit," nor is it, in the true meaning of the term, "personal property not capable of manual

delivery." We think that it is evident that the phrase last above mentioned is intended to apply exclusively to intangible personal property, or at least to such personal property as may be impossible for the Sheriff to take into his possession either by actually handling the same or by placing someone in charge thereof.

The Trial Court's conclusion seems to be based upon what is said by the Supreme Court of California in the case of Rudolph vs. Saunders, 111 Calif. 233, 43 Pac. 619. The Trial Court cites this case as supporting his views in his opinion (Rec. p. 103). The property involved in the above case, however, was a growing crop of thirty acres of beans and the California Court reaches the conclusion that this property was not capable of manual delivery, and that, therefore, it must be attached as personal property not capable of manual delivery. Obviously the nature of the property with which the California Court was dealing and that which is the subject of the attachment in this case is very different.

It should, moreover, be observed that subdivision 5 of Section 542 of the Code of Civil Procedure of California, which deals with personal property not capable of manual delivery, is not the same as Section 5 of the Idaho Statute above set forth, but contains in addition the following provision:

> "except in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached and a notice that it is attached, shall be recorded the same as in the attachment of real property."

We contend, therefore, that the case upon which the Trial Court bases his decision offers no analogy, and considering the difference in the statutes applicable to the particular property with which the California Court was dealing, the case lends absolutely no support for the views adopted by the Trial Court.

As shown by the cases from the Supreme Court of Idaho and from other states heretofore cited, the very idea and purpose of an attachment of personal property is to place the same within the exclusive control and custody of the officer, in so far as the nature of the property will permit. There has been no attempt at even a substantial compliance with the statute until the officer has done all that is reasonably possible for him to do, considering the circumstances and the nature of the property, in order to place the same under his custody and control.

All the evidence in this case was taken by depositions with the exception of part of the evidence of G. B. Quarles, who was present at the trial and testified orally and identified exhibits which were introduced in evidence (Rec. pp. 85-93). This Court, therefore, is in as good a position as was the Trial Court to determine the weight and effect of the evidence, and we are firmly convinced that this Court can reach but one conclusion as to the custody and control of the warehouse, and that is, that neither the Sheriff nor Mr. King had any control, custody or possession of the warehouse at the time the chattel mortgage was given, but that the warehouse then was, long prior thereto had been, and for several months thereafter was, in the absolute pos-

session and under the dominion and control of G. B. Quarles.

We are likewise of the opinion that the Trial Court misconstrued the Idaho statute applicable to the attachment of this warehouse; that the attachment was absolutely ineffectual and void and created no lien in favor of defendant and appellee, and that plaintiffs' mortgage attached became a lien on the building long prior to the levy and sale under execution in January, 1923, by the Citizens National Bank. Hence, the sale under the foreclosure of plaintiffs' mortgage passed the title to the building to Rose Loring Quarles for plaintiffs' benefit and plaintiffs are entitled to a decree quieting their title to the warehouse.

The order dismissing the bill should, therefore, be set aside and the Trial Court directed to enter a decree quieting plaintiffs' title.

Respectfully submitted,

RICHARDS & HAGA and
CHARLES H. DARLING,
Solicitors for Appellants,
Residence: Boise, Idaho.

NO. 5624

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

JOHN VERNON QUARLES and HOPE VIRGINIA FINN, Appellants,

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, Appellee.

Brief On Behalf of Appellee

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

JONES, POMEROY & JONES, and E. H. CASTERLIN,

Residence: Pocatello, Idaho, and Salmon, Idaho, respectively.
Solicitors for Appellee.

NO. 5624

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

JOHN VERNON QUARLES and HOPE VIRGINIA FINN, Appellants,

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, Appellee.

Brief On Behalf of Appellee

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

JONES, POMEROY & JONES, and E. H. CASTERLIN,
Residence: Pocatello, Idaho, and Salmon, Idaho, respectively.
Solicitors for Appellee.

INDEX

Page

Statement of Facts 5

Argument 13

TABLE OF CASES

Case — Page

Cardenas vs. Miller (Cal.) 39 Pac. 783 22

Eisenbud vs. Crancimino 69 N. Y. Supp. 672 33

Hall vs. Carney, 140 Mass. 131, 3 N. E. 14 22

Irillary vs. Byers (Cal.) 257 Pac. 540 20

Jongewaard vs. Gesquire, 199 N. W. 585 (No. Dak.) 33

Laughlin et. al. vs. Reed, 89 Maine 226, 35 A. 130 28

Lindsey vs. Mexican Crude Rubber Co. 197 Fed. 775 33

Leo vs. Maxwell, 1 Head (Tenn.) 365 33

Rudolph vs. Saunders, (Cal.) 111 Cal. 233, 43 Pac. 619 21

Raventas vs. Green, 57 Cal. 254, Book 19, Pac. St. Rep 21

Tafts vs. Manlove (Cal.) 14 Cal. 47 33

Young vs. Walker, 12 N. H. 502 31

TEXT BOOK CITED

Page

31 C. J. page 1013, Sec. 55 33

6 C. J. page 228, Sec. 432 18

17 R. C. L. Sec. 78 page 181 18

Blacks Law Dictionary Second Edition, page 757 19

38 C. J. 961 19

STATUTES CITED

Page

Section 6784 Subdivision 5, Idaho Compiled Statutes 16

Section 542 Subdivision 5, California Code of Civil Procedure 19

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

JOHN VERNON QUARLES and HOPE VIRGINIA FINN, Appellants,

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, Appellee.

STATEMENT OF THE CASE.

On April 15, 1922, appellee, Citizens National Bank of Salmon, Idaho, hereinafter called the Bank, commenced suit in the District Court of the Sixth Judicial District of the State of Idaho, of Lemhi County, against G. B. Quarles, to recover on a promissory note dated December 28, 1921, for $4,556.99, with interest at 10% per annum from date, payable on demand. Summons and writ of attachment were duly issued in said cause on April 15, 1922, and on April 17, 1922, pursuant to said writ of attachment, the Sheriff of Lemhi County, Idaho, acting by himself and through his deputy, J. L. Kirtly, (deceased since May 19, 1924,) levied on a certain wool warehouse, along with other property belonging to the defendant, G. B. Quarles, by serving on the defendant, then in possession thereof, a copy of complaint, summons and writ of attachment, together with a notice that the wool warehouse, describing it, was attached (Rec.

pp. 53, 65-69). At the time of said attachment, the Sheriff, through his deputy Kirtly, appointed H. G. King, custodian of the warehouse and gave him a key to the same (Rec. p. 60). King continued to act in such capacity until after the property was sold to the Bank under execution sale (Rec. p. 63). The wool warehouse was built on the right-of-way of the G. & P. Railway Company, and was 80 feet by 48 feet in size, exclusive of platform, and built on concrete piers (Rec. pp. 20 & 50). At the time of the attachment there was no written lease for the land upon which the warehouse was located.

There is no dispute that the said wool warehouse is personal property and the size and description establishes the fact that the same was incapable of manual delivery at the time of said levy of attachment.

Subsequent to the levy of said attachment and on July 14, 1922, G. B. Quarles in person, made and filed a motion in the action in which said attachment was issued, to discharge the wool warehouse from the lien of the attachment on the ground that the amount of property attached was excessive, which motion contains, among other matters, the following recitals:

"The Sheriff reports to have levied upon as personal property that certain wool warehouse which is the property of the defendant; that the writ was levied April 17, 1922, and that the time has lapsed within which other creditors could procure judgments and pro rate in the proceeds of the sale of the attached property; that the defendant moves that all of the property so attached with the exception of 185 shares of stock of the Citizens National Bank, be discharged from the lien of the attachment and that the discharge be established of record except as to said stock (Rec. pp. 65-66)."

Thereafter, on the 28th day of July, 1922, an order was made by the District Judge denying said motion to discharge the attachment, and no appeal was taken from said order (Rec. p. 66).

On October 2, 1922, judgment was entered against the defendant, G. B. Quarles, from which no appeal was taken. Thereafter, on the 15th day of January, 1923, a writ of execution was issued out of the said District Court in the said case of Citizens National Bank against G. B. Quarles, directed to the Sheriff of Lemhi County, an containing, among other matters, the following recitals:

"That it is based upon a judgment for $5,291.38 entered in said case on October 2, 1922, all of which is unpaid; that the following described property as well as other property was attached on April 15, 1922, all right, title and interest of G. B. Quarles in and to said wool warehouse; commanding the said Sheriff to sell the said property to satisfy said judgment."

And pursuant to said writ of execution, on said judgment, and on the 22nd day of January, 1923, the wool warehouse was sold to the Bank (Rec. pp. 66-67), which immediately took possession and has since retained exclusive control thereof. On May 1, 1923, the Gilmore & Pittburgh Railroad Company leased to the Bank the site of the warehouse which lease was in effect until April 30, 1928, the annual rental being $50.00 (Plaintiff's Ex. F & G; Defendant's Ex. 1 and the lease and receipt attached).

On May 29, 1922, this being subsequent to levy of attachment and prior to motion to discharge warehouse from said attachment, the same G. B. Quarles, made his note dated that day, in favor of John Vernon Quarles and Hope Vir-

ginia Quarles, his children by a former wife, named Hope McCaleb Quarles, for $4,490.88, with interest at 7 per cent per annum from date, payable on demand. John Vernon was born October 14, 1903, and Hope Virginia was born July 26, 1907. On May 31, 1922, both children being then over the age of 14 years, H. L. McCaleb, a brother of Hope McCaleb Quarles, together with G. B. Quarles, filed a petition in the District Court of Lemhi County to appoint H. L. McCaleb guardian ad litem for the purpose of bringing suit on the note. The petition, among other things, recited:

"That heretofore the Citizens National Bank of Salmon, Idaho, commenced an action in this Court against the said G. B. Quarles, and caused to be issued out of this Court a writ of attachment against the property of the said G. B. Quarles; that it is doubtful whether on sale of the said property so attached it will sell for sufficient to pay all the debts of said G. B. Quarles, and it is therefore necessary to commence this action and prosecute the same to judgment within sixty days from the date of said attachment in order that the said creditors, John Vernon Quarles and Hope Virginia Quarles, may share in the proceeds of the sale of the attached property." (Ex. E, and Rec. p. 64.)

On the same day an order was made appointing H. L. McCaleb guardian ad litem of John Vernon Quarles and Hope Virginia Quarles, and the said guardian ad litem on the same day filed a complaint on the note given by G. B. Quarles to his children, in the District Court of Lemhi County, against G. B. Quarles, who appeared by general demurrer without service of summons, and the demurrer was overruled, and defendant announced in open Court that he would not plead further; whereupon the default of the defendant was entered and the plaintiff secured judgment (Ex. E, Rec. p. 53), on said note against G. B. Quarles. These proceedings were all taken on the same day.

On the following day, June 1, 1922, Quarles executed a chattel mortgage to H. L. McCaleb on the wool warehouse and other property to secure the payment of the judgment, which mortgage specifically provides that it is given as additional security to any security that might exist by reason of the judgment lien on real estate and that it "does not waive the right of the judgment creditor of the said G. B. Quarles to share in the proceeds of the sale of any attached property, attached in the suit of the Citizens National Bank against the said G. B. Quarles" (Rec. pp. 20, 53-65).

On September 21, 1922, the mortgagee McCaleb commenced summary foreclosure of said chattel mortgage, the affidavit in foreclosure and notice of sale were placed in the hands of T. J. Stroud, Sheriff, who served the same on G. B. Quarles, and in furtherance of the foreclosure proceedings the Sheriff appointed one, Frank H. Haveman, as keeper, subject and subordinate, however, to the duties of H. G. King as custodian of the warehouse under the attachment proceedings, it being testified by the Sheriff that at the time he served the foreclosure papers on Quarles he already had peaceable possession of the warehouse under the writ of attachment and whatever was done was subject to the writ of attachment (Rec. p. 71).

The Sheriff proceeded under the foreclosure proceedings to sell all right, title or interest of G. B. Quarles in and to the warehouse and the same was struck off to Rose Loring Quarles, the wife of G. B. Quarles, on September 30, 1922, for $25.00. The Sheriff's return on foreclosure, the Sheriff's certificate of sale, the bill of sale from Rose Loring Quarles, and the bill of sale from Rose Loring Quarles and G. B. Quarles to the children, all state that she was the purchaser. On September 11, 1925, Rose Loring Quarles made and delivered her bill of sale to John Vernon Quarles, con-

veying all of her title to said warehouse; and on June 28, 1926, Rose Loring and G. B. Quarles made and delivered their joint bill of sale conveying to John Vernon Quarles and Hope Virginia Finn, all of their title (Ex. E, C, D, B.).

The plaintiffs commenced this action on July 7, 1926, for the purpose of obtaining judgment decreeing, that the attachment levied by the Citizens National Bank on April 17, 1922, was void as against said warehouse; that the mortgage from Quarles to McCaleb was first and prior lien against the wool warehouse; that the foreclosure vested in Rose Loring Quarles a good and valid title to said warehouse; that the execution sale of said warehouse to the Bank transferred no right therein to the Bank; to obtain an accounting of the income of the property, and further to obtain a decree quieting title in and to said property in the plaintiffs (Rec. pp. 7-19).

The material allegations of plaintiffs' complaint are put in issue by the answer of the defendant, Rec. pp. 24-44, and the defendant set up by way of additional and separate defenses:

1. That at the time the chattel mortgage was given, the warehouse was in the custody of the law under and by virtue of the writ of attachment which had been levied against it by the defendant and was so held until the said property was sold under execution to the defendant (Rec. pp. 36-37).

2. That the judgment obtained against Quarles by McCaleb, guardian ad litem, and the chattel mortgage which was given to McCaleb in his individual capacity, was had and done for the purpose of defrauding the creditors of Quarles, particularly this defendant; that said mortgage was made in contemplation of bankruptcy and said judgment and mortgage were not made in good faith for a con-

sideration, but was done with the intent to delay and defraud creditors; that all of the acts set forth in defendant's second separate defense were done collusively by the relatives of these plaintiffs in fraud of the rights of the creditors (Rec. pp. 37-38-39). (In this connection the records show that said G. B. Quarles took bankruptcy on October 16, 1922 (Rec. p. 13), which was just four and one-half months from the date he executed said chattel mortgage.)

3. That on account of the matters and things set out in the separate defense of the defendant (Rec. pp. 40-44), plaintiffs waived any right to assert that said attachment was invalid and are estopped to assert that they had a lien by virtue of said alleged mortgage on said warehouse, except a lien subject and subordinate to defendant's attachment and are estopped to question the validity of the defendant's levy under said attachment.

The defendant also pleaded the Statutes of Limitations as against the right of the plaintiffs to bring this action upon the issues thus formed. The Court held that the action was not barred by the Statute of Limitations but decided that the defendant's writ of atatchment was legally levied and constituted a prior lien against the warehouse to plaintiffs' claim and ordered a decree of dismissal in favor of the defendant (Rec. p. 106). The question presented on this appeal involves the validity of the attachment levied by the appellee Citizens National Bank on the warehouse.

BRIEF OF THE ARGUMENT.

Personal property incapable of manual delivery is attached by leaving with the person having in his possession said personal property a copy of the writ of attachment together with a notice that the property is attached in pursuance to such writ.

Subdivision 5, *section* 6784, *Idaho Compiled Statutes.*

The warehouse in question is personal property incapable of manual delivery within the meaning of sub-division 5, section 6784 of the Idaho Compiled Statutes.

38 *C. J. page* 961;

Blacks Law Dictionary, Second Edition, page 757;

Irilarry vs. Byers, (*Cal.*) 257 *Pac.* 540.

The warehouse in question was validly attached.

Irilarry vs. Byers, (*Cal.*) 257 *Pac.* 540;

Rudolph vs. Saunders, (*Cal.*) 111 *Cal.* 233, 43 *Pac.* 619;

Raventas vs. Green, 57 Cal. 254, Book 19 Pac. State Repts.;

Cardenas vs. Miller, (Cal.) 39 Pac. 783;

Hall vs. Carney, 140 Mass. 131, 3 N. E. 14;

Laughlin vs. Reed, 89 Me. 226, 36 A. 130;

6 *C. J.,* page 228, section 432;

17 *Ruling Case Law,* section 78, page 181;

Eisenbud vs. Crancimino, 69 N. Y. S. 672;

Jongewaard vs. Gesquire, 199 N. W. 585 (N. D.);

Lindsey vs. Mexican Crude Rubber Co., 197 Fed. 775;

Leo vs. Maxwell, 1 Head (Tenn.) 365;
Tafts vs. Manlove, 14 Cal. 47;
Young vs. Walker, 12 N. H. 502;
31 *C. J.,* page 1013, section 55.

ARGUMENT.

Under Specifications of Error numbers 2 and 4, it is claimed by the appellants that the Court erred in holding that the wool warehouse in question is personal property not capable of manual delivery. It is conceded on both sides that the wool warehouse is personal property, but it is contended on the part of the appellants that the same is capable of manual delivery. This contention of appellants is not supported by any authorities and the only argument urged in behalf thereof, so far as we are able to ascertain from appellants' brief, is the bold statement found at the bottom of page 30, wherein it is said, "there is absolutely nothing in this record to indicate that this warehouse is of such a character that it is not capable of manual delivery."

In determining whether there is any merit to the contention of appellants we call this Honorable Court's attention to the nature and size of the wool warehouse in question. G. B. Quarles, witness for the appellants, testified that the size of the warehouse is 80 by 48 feet exclusive of a platform on the outside, which is 8 by 48 feet, and is built on concrete piers (Rec. p. 50). Exhibit "A" attached to plaintiffs Bill of Complaint (Rec. p. 20), discloses that the wool warehouse was a frame structure, sides and roof of iron and concrete foundation. This evidence is undisputed. It is at once apparent that the size and character of the building demonstrates that the property in question was not capable of manual delivery.

It may be well at this point to review briefly the authorities cited by appellants for the purpose of showing that they have no application to the instant case. All the cases cited by appellants in their behalf clearly involve the attachment of property which was capable of manual delivery with the exception of the cases of, Crisman vs. Dorsey (Colo.), 21 Pac. 920, and Throop vs. Maiden (Kan.), 34 Pac. 801, which will be discussed later in this brief.

The case of Hollister vs. Goodale involves the attachment of a four wheel carriage, known as a barouche.

In the case of Dutertre vs. Driard, (Cal.) 7 Cal. 549, the subject matter of the attachment was furniture in a restaurant.

Herron vs. Hughes, 25 Cal. 555, 563, was the case of an attachment of certain boots and shoes which the Constable never saw nor took into his possession.

In the case of Smart vs. Sosey, (Cal.) 193, Pac. 167, the property consisted of soap, soap cans and a Ford automobile, which were of a readily movable character and so declared in the case of Irilarry vs. Byers, (Cal.) 257 Pac. 541.

The case of American Fruit Growers, Inc., vs. Walmstead, 44 Ida. 786, 260 Pac. 168, involves the validity of an attachment on four thousand potato sacks. The Court held "in case of tangible property susceptible of manual seizure and delivery such property must be actually seized and taken into possession."

In Green vs. Hopper, (Nev.) 167 Pac. 23, the facts disclose that an attachment was levied against some machinery on June 4, 1914; thereafter, on June 14th, of the same year,

pursuant to a motion, the Court discharged the attachment; on the same day in which the order discharging the attachment was made the Sheriff delivered the property to the defendant, Hopper, and took a receipt from him and never again attempted to take control or possession of said property; subsequent thereto the defendant mortgaged said property and thereafter, on July 18, 1914, the plaintiff perfected his appeal from the order discharging the attachment and at the same time obtained from the Judge who made the order discharging the attachment an order staying the operation of the order discharging said attachment. Held: Where the Court dissolved an attachment of personal property and the attaching officer immediately delivered it over to the debtor and took his receipt therefor, the Court's order was executed and the subsequent appeal and bond staying the execution of the order was ineffective, and the debtor might thereafter dispose of the property as he saw fit.

We are unable to see wherein this case has any application to the case at bar for the reason that in the instant case no discharge of the attachment was made by the Court but on the other hand an order was made denying the release of the wool warehouse from the attachment.

An examination of the above cases which have been cited and quoted from by Appellants in their brief will disclose that the subject matter of the attachment in each instance involved personal property capable of manual delivery and are not in point for the reason that the subject matter involved in this case consisted of property clearly incapable of manual delivery.

Before reviewing the case of Crisman vs. Dorsey, cited and relied upon by Appellants in their brief in support of

their contention that the warehouse involved in this action is personal property capable of manual delivery, it is deemed advisable to point out the difference in the wording of the Idaho Statute in question, and the Colorado Statute upon which the Crisman vs. Dorsey case is based. Section 6784, Subdivision 5 of the Idaho Compiled Statutes, is as follows:

> "Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control, belonging to the defendants, are attached in pursuance of such writ."

The above quoted Statute is the only one in Idaho dealing with the attachment of personal property incapable of manual delivery.

Subdivision 2, of the Colorado Statute, as quoted in the case of Crisman vs. Dorsey, reads as follows:

> "Debts, credits, *and other things in action,* which are not capable of manual delivery, shall be attached by leaving with the person owing such debts or with his agent, a copy of the writ of attachment, etc."
> (Italics ours.)

It is claimed by Appellants in their third specification of error that the Court erred in deciding that the Idaho Statute above quoted applies to the warehouse involved in this action and contend that the above statute only applies to, debts, credits and intangible personal property. In support of this contention the Appellants rely upon the case of Crisman vs. Dorsey, 21 Pac. 920, from which they quote quite extensively.

It will thus be observed that there is a vast difference in the wording of the Colorado Statute and the Idaho Statute. The Idaho Statute above quoted reads, "Debts and credits *and other personal property not capable of manual delivery,* etc." (Italics ours.) It will be observed that in the Colorado Statute no mention is made of, other personal property incapable of manual delivery, but the words, *and other things in action,* are used after the words debts and credits, which are not capable of manual delivery, whereas in the Idaho Statute after the words debts and credits it specifically mentions, *and other personal property not capable of manual delivery.* (Italics ours.)

It will thus be seen that there is a vital difference in the wording of the two Statutes and that the case of Crisman vs. Dorsey based upon the Colorado Statute lends no support to the Appellants contention as to the construction of the Idaho Statute.

In the other case relied upon by the Appellants, viz, Throop vs. Maiden, 34 Pac. 801, which involved the validity of an attachment of forty acres of corn. The officer went to the field on October 9th, and declared a levy upon forty acres of corn standing therein and caused it to be appraised. He delivered a copy of the order to the defendant and informed him that he had levied upon and was going to hold custody of the corn. He then left the field and did not return to or exercise any dominion over the property levied upon until December 3, 1889, when he came back to advertise a proposed sale. He not only did not retain possession of the corn but he failed to put in charge or keeping of another for him and no notice was posted that a seizure had been made or that possession was claimed by virtue of an attachment lien. Held: That the levy of attachment insufficient.

It will be observed in this case that if there was any Statute in the State of Kansas similar to the Idaho Statute above quoted, that no attempt was made to levy upon the corn in accordance therewith, and that no one was appointed as custodian, or that no notice was posted that a seizure had been made or that possession was claimed by virtue of the attachment. This case can throw no light upon the construction of the Statutes of Idaho and involves such a different state of facts that it is, as we view it, not in point.

Appellants on page 19 of their brief quote verbatin from 6 C. J. page 223. The general rule therein stated respecting a levy on personal property should in view of the nature of the property in this case be read in connection with the principle of law set out in 6 C. J. page 228, Sec. 432, etc., wherein it is stated:

> "Where property is incapable or difficult of manual delivery, the officer may not be required to take actual possession thereof, but some notorious act as nearly equivalent to actual seizure as practical must be substituted, and such steps taken as will fasten the property in the hands of the person who has possession or control, to await the judgment in the case, or such person must be required to place it in the hands of the Court. Some statutes prescribe that a levy upon such personalty is to be made by delivering a copy of the writ or order, with a notice specifying the property attached, to the person holding the same or to his authorized agent, while others provide that a certified copy of the writ and of the return may, within a certain time, be deposited in a specified office, and that such attachment shall then be as valid as if the articles had been retained by the officer."

Upon this same question in 17 R. C. L., Sec. 78, page 181, the law is stated as follows:

> "It should be observed, however, that although there

> are many cases in which executions or attachments have been sustained, where the property, though personal, was not reduced to the actual possession of the officer, such as the attachment of blocks of granite, a house on another person's land, a barn full of hay, etc., these decisions were in the main not intended to disturb the law requiring an officer to take possession of personal property, but were merely relaxations of the rule on the subject, owing to the ponderous and bulky nature of the property to be attached; *and to meet such cases, adequate provision is now very generally made in the statutes of the several jurisdictions.*" (Italics ours.)

In support of the decision of the Court that the warehouse in question was personal property incapable of manual delivery and that attachment thereon was legally levied, we shall first consider what is meant by manual delivery. Manual delivery means:

> "Delivery of personal property sold, donated, mortgaged, etc., by passing it into the 'hand' of the purchaser or transferee, that is, by an actual and corporeal change of possession."
>
> 38 *C. J.* page 961; *Blacks Law Dictionary,* Second Edition, page 757; *Irilarry vs. Byers,* 257 Pac. 540.

The Supreme Court of California, in a recent decision in the case of Irilarry vs. Byers, 257 Pac. 540, construed section 542, subdivision 5 of the Code of Civil Procedure of California, which reads as follows:

> "Debts and credits and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his

possession, or under his control, belonging to the defendant, are attached in pursuance of such writ, except in the case of attachment of growing crops, a copy of the writ together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property."

The California Statute above quoted is identical with 6784, Subdivision 5 of Idaho Compiled Statutes, except that it now contains an additional requirement with respect to the attachment of growing crops. The necessity of having a notice of the attachment recorded does not apply to any other class of property incapable of manual delivery.

The case of Irilarry vs. Byers, 257 Pac. 540, above referred to, involved the attachment, among other things, of a steam shovel, and in construing the California statute above quoted, in that case the Court said:

"There is no necessity for an actual handling of heavy and unmanageable articles to levy or maintain an attachment. Dreisbach v. Braden, 40 Cal. App. 407, 181 P. 262. The mere service of a writ upon the defendant, as in the case of attachment of real estate, is sufficient. Rudolph v. Saunders, 111 Cal. 233, 43 P. 619. It is not requisite to the attachment of personal property not capable of manual delivery that it be taken into custody by the sheriff, nor that, having been taken by him, his possession be retained. Code Civ. Proc., Sec. 542, subd. 5. It is obvious that, as the evidence shows this steam shovel to have been situated, it was not then capable of manual delivery."

It is contended by Appellants in their brief on page 32 and the top of page 33, that the case of Rudolph vs. Saunders, 111 Cal. 233, 43 Pac. 619, cited by the Trial Court as supporting his opinion, lends absolutely no support to the views adopted by the Trial Court for the reason that the

property involved in that question was a growing crop, and that the California Statute is different from the Idaho Statute with reference to the attachment of this class of property.

The case of Rudolph vs. Saunders, Supra, was decided in 1896, at which time the California Statute had not been amended so as to require the notice of the attachment in the matter of growing crops to be recorded. The decision contains the Statute as it existed at that time, which was identical with the Statute of Idaho at this time, and in this case the Court said:

> "It is true, the return states that defendant attached the property 'taking in my possession'; but the property, being a growing crop, not capable of manual delivery could only be attached by service of the writ and a notice as provided by Subdivision 5, Section 542, Code of Civil Procedure."

Again in the case of Raventas vs. Green, 57 (Cal.) 254, Pac. St. Reps. Book 19, the Supreme Court of California was called upon to construe Section 542, Subdivision 5 of the Code of Civil Procedure of California, which Statue at that time is identical with Section 6784, Subdivision 5 of the Idaho Compiled Statute. A brief statement of the facts in this case are as follows:

> One, McClellan had leased a tract of land on which he had a growing crop of unripe grain; action was commenced against him for the recovery of a money demand in which action a writ of attachment was issued and levied by the Sheriff on the growing crop, afterwards McClellan executed to the assignor of the plaintiffs, who had notice of the attachment, a chattel mortgage on the crop. When the crop matured the Sheriff holding the writ reaped it and subsequently under an execution issued in the action against McClellan, sold

it. The holders of the chattel mortgage then brought suit to recover of defendants the crop or its value.

It was contended by the appellants, plaintiffs in the Court below:

First, that an unripe growing crop is not the subject of attachment; Second, if so, that there was no valid attachment in the case, and Third, that if this be true that the lien of attachment was abandoned.

It was held in this case that an unripe crop of grain is subject to attachment and is personal property not capable of manual delivery. And in this case the Court says further:

"The purpose of the Statute was, as its language indicates, to declare the manner in which property subject to attachment should be attached; and with respect to personal property provide that such property when capable of manual delivery must be attached by the officer taking it into his custody; but that where not capable of manual delivery, must be attached by leaving with the person having it in his possession or under his control, or with his agent, a copy of the writ and a notice that it is attached in pursuance of such writ. Personal property not capable of manual delivery, which is in the hands of the defendant to the attachment suit, is as much liable to the attachment as if in the hands of a third person. Yet we are asked by appellants so to construe Section 542 as to exempt such property from attachment, when it is in possession of the defendant himself. A construction which would lead to such a result cannot be adopted."

See also, Cardenas vs. Miller, (Cal.) 39 Pac. 783.

In the case of Hall vs. Carney, 140 Mass. 131, 3 N. E. 14, an action was brought by Deputy Sheriff to recover of a Constable for conversion of a passenger car. Plaintiff, a Deputy Sheriff, having in his hands for service

a writ against railroad company, made demand upon the president and superintendent thereof for property other than a railroad car upon which to make an attachment, but none furnished, upon which refusal to comply with said request plaintiff went with his writ to a passenger car, part of the rolling stock of said R. R. with intent to attach the same as personal property, declared that he attached the car, and told conductor to run it off upon a siding, and upon the latter's assent, went away, leaving no keeper in charge of the car. Conductor did not do as he agreed, but made a trip with it to the other end of the line, where about one hour later it was taken possession of by the defendant, a Constable, who under tort to attach it on another writ and who retained possession personally or by a keeper until it was sold by him. It also appeared that plaintiff, four hours after defendant's attempted levy, deposited in the office of the Town Clerk an attested copy of his writ and so much of the return as related to the car, and afterward returned the writ to the Court, certifying said demand, refusal and seizure.

Held: Railroad cars are, for the purpose of attachment, personal property. It is not necessary for an officer in attaching such property to take possession of the same personally or by a keeper, to preserve the attachment. Attachment by plaintiff was in compliance with the Statute and sufficient.

Appellants contend that the evidence is unsatisfactory as to the service of a copy of the writ and notice of attachment being served upon the defendant, G. B. Quarles. In answer to this statement we desire to call the Court's attention to the fact that G. B. Quarles testified that they served upon him, a copy of the complaint, a copy of the summons, a copy of the writ of attachment, and a notice that certain property was attached (Rec. pp. 53 and 54), and he further testified that the wool warehouse in question was specified upon the notice of attachment which was served upon him

(Rec. p. 56). Appellants further contend that the Sheriff admits that he does not know whether the notice of attachment was served.

Mr. Stroud testified:

"I was Sheriff of Lemhi Cuonty during the years 1922 and 1923; during said time a levy of attachment in the case of Citizens National Bank vs. G. B. Quarles was made by my office; J. L. Kirtley, who was Deputy Sheriff at that time, served the papers. I did not personally serve or levy any Writs of Attachment in that case. I always went over the papers and attachments in cases of this kind before they left the office."

On cross examination by counsel for defendant the witness T. J. Stroud testified:

"I went over the papers in the office in the case in question before they were served. Mr. Kirtley prepared the papers and after they were prepared I went over them. A summons, attachment and notice of attachment were given to Mr. Kirtley to serve. The notice was to the effect that certain property is attached—the warehouse. I don't find a copy of the Notice of Attachment that was to be served upon Mr. Quarles attached to plaintiff's Exhibit 'G'. There is one thing I would like to have understood; when these papers were returned I wouldn't say the notice was attached to the writ, but it left the office to be served upon Mr. Quarles. I went over the matter of the service of the papers with Mr. Kirtley. When Mr. Kirtley came back he gave me a list of the papers that were served and he copied them on the Day Book and I copied them on the Attorney's Record, all papers that were served in the case. I made a charge on my book for a Notice of Attachment, that the

warehouse was attached. It will appear on my book in the charge I made for the copies. I don't think that I instructed Mr. Kirtley to serve the notice that the wool warehouse was attached, upon Mr. Quarles, along with the Writ of Attachment, as Mr. Kirtley knew. Mr. Kirtley had served papers a great many times during that time. I instructed him to be careful about serving papers in the case. When Mr. Kirtley came back after serving the papers he did not have in his possession the notice that was to be served upon Mr. Quarles. Mr. Kirtley is now dead. When Mr. Kirtley left the office to serve these papers he took with him the original notice that the warehouse was to be attached. When he returned he did not have the original. Mr. Kirtley told me that he served the papers on Mr. Quarles and he gave me a list of them and this list included a copy of the Writ of Attachment and a copy of the notice to Mr. Quarles that the wool warehouse in his possession was attached by virtue of the Writ."

When this evidence is taken in connection with the fact that Mr. Quarles admitted that he was served with a notice that the warehouse was attached, it is submitted that the Court was amply justified in finding that a notice that the warehouse in question was attached in pursuance of the writ of attachment (Rec. p. 103). In this connection it must be borne in mind that defendant himself must have been cognizant of the fact that the warehouse had been attached as is evidenced by the fact that after the attachment was made, Quarles, together with H. L. McCaleb, set out in the application for the appointment of a Guardian ad litem, that the Citizens National Bank of Salmon, in an action commenced against G. B. Quarles, caused to be issued a writ of attachment against the property of Quarles, and that it was doubtful whether the sale of said property so attached would be sufficient to pay all the debts of G. B. Quarles and

that it was necessary to commence an action against him in behalf of his children in order that they may pro-rate in the proceeds under the sale of the attached property (Ex. "E" Rec. p. 64), and the further fact that the chattel mortgage in question, upon which Appellants rely, contained a clause that the mortgagee did not waive the right of the judgment creditor of said G. B. Quarles to share in the proceeds of the sale of the attached property (Rec. pp. 20, 21, 53 and 65), and the further fact that upon the motion made for the discharge of certain property from the attachment subsequent to the giving of this chattel mortgage the said G. B. Quarles set forth in said motion, in effect, that the Sheriff reported to have levied upon the warehouse in question and that the time had lapsed in which other creditors could procure judgments and pro-rate in the proceeds of the attached property (Rec. pp. 65, 66).

We do not believe the Appellants seriously contend that the Court was not justified in finding that a notice was served upon G. B. Quarles that the warehouse was attached pursuant to the writ of attachment because at the bottom of page 26 of Appellants brief it is said by Appellants in refering to the question as to whether the notice was served. "However this may be, it is appellants' contention that since the record clearly shows that the Sheriff did not take and retain custody or control of the property, either by himself or through the agency of any deputy or custodian, it must follow that there was no valid levy upon the property." It will thus be seen that the Appellants rely entirely upon the fact that the warehouse in question was personal property capable of manual delivery and could only be attached under Subdivision 3 of Section 6784 of the Idaho Compiled Statutes, which reads as follows, "personal property capable of manual delivery must be attached by taking it into custody." Further quoting from the Appellants

brief at page 27, "The method of attachment prescribed in subdivision 3 of Section 6784 is the exclusive method whereby personal property such as this warehouse could be validly attached and levied upon. This is the method, and the only method prescribed for the attachment of tangible personal property." This being the contention of Appellants, the fallacy of their argument is clearly shown not only by the plain language of our Statute under Subdivision 5, above quoted, but also by the construction placed upon such a Statute by the California Supreme Court and other cases in this brief cited.

The Sheriff's return on the attachment, among other things, (Rec. p. 65, Plaintiff's Ex. "G") states that, "I attached that certain building known as the wool warehouse, located on the right of way of the Gilmore & Pittsburgh Railroad Company, south of the tracks of said Company and Westerly from the Depot, in Salmon, Lemhi County, Idaho, the same being designated by plaintiff as personal property, levied upon as such and placed in the hands of H. G. King, as custodian."

While the said return does not in detail recite all that was done, the testimony of Sheriff Stroud and the admissions of G. B. Quarles shows that the notice that the property was attached, pursuant to the writ was actually served.

The fact that the Sheriff appointed a custodian to look after said property during the pendency of the attachment, while unnecessary where the attachment was made under Subdivision 5 of the Idaho Statute, above quoted, would be treated as an additional precautionary act and in no way affect the levy made under Subdivision 5, Sec. 6784, Idaho Compiled Statutes, Laughlin vs. Reed, 89 Me. 226, 36 Atlantic, 130.

It will be observed that in the case Laughlin et al, vs. Reed 89 Me. 226, 36 Atlantic 130, which involved the attachment of a building located upon leased premises, that the Statute provided that when personal property is attached, which by reason of its bulk or other special cause cannot be immediately removed, the officer may record the attachment in the office of the Clerk of the town in which the attachment is made, but when the attachment is made in an unincorporated place it shall be filed and recorded in the office of the Clerk of the oldest adjoining town in the County. In this case, the Sheriff, in addiiton to serving the writ and notice, as provided by the Statutes of Maine, as a precautionary measure, placed a keeper in charge of said building, and the defendant contended that the Sheriff was a trespasser abinitio for the reason that he unnecessarily placed a keeper in charge of said building. The Court, in determining whether or not the Sheriff was a trespasser by reason of the precautionary measure which he took in this attachment, held:

> "Prior to the enactment of this Statute, in order to perfect and preserve an attachment of such personal property, it was the duty of the officer, either by himself, or by a keeper appointed by him for that purpose, to 'take and retain possession and control of the property attached, or have the power to take immediate control'."
>
> This Statute did not deprive the officer making the attachment of the right to take actual possession of the property, if reasonably necessary for its preservation although the probability of its forcible removal might be very remote.
>
> Judgment for defendant.

The above case clearly decides that the fact that a Sheriff may take precautionary measures and do more in an at-

tachment proceeding than the Statute prescribes, still his action does not in any way invalidate the attachment made in compliance with the Statutes.

Appellants are in error in their statement at page 14 of their brief, to the effect that the defendant's theory when the attachment was levied, and throughout the case, was that the warehouse could only be validly attached by complying with Subdivision 3 of Section 6784 of the Idaho Compiled Statutes, for the reason that it appears from the record at pages 67 to 70 that the testimony of the Sheriff, T. J. Stroud, pertained largely to the fact that a notice was served upon G. B. Quarles that the warehouse has been attached pursuant to the writ of attachment. The record further shows at page 56 that G. B. Quarles testified before the Commissioner at Los Angeles as well as at the trial of the case with reference to the question of the service of the notice of attachment upon him that the warehouse was attached.

Under Specifications of Error No. 9, it is urged that the Court erred in deciding that H. G. King had such custody and control of the warehouse as required by the Statutes of the State of Idaho in order to constitute a legal and valid attachment of such property.

Even if we should concede for the purpose of argument that Appellants' view is correct, that the warehouse could only be attached by complying with Subdivision 3, Section 6784, Idaho Compiled Statutes, it is submitted that the Court was justified in view of the character of the property involved in finding that King was actual custodian of said property and that he retained the custody of the same. In this connection the testimony of Mr. King is undisputed to the effect that he was appointed custodian at the time the

attachment was made, which appointment he accepted, and at that time the Deputy Sheriff, Kirtley, gave him a key to the warehouse (Rec. p. 60). He further testified to the effect that during the time he was acting as custodian he was over to the warehouse a number of times; that he did not know of any person that had a key to the warehouse; that he never saw G. B. Quarles there during the time he was custodian; that on several occasions he actually went over to the warehouse and that he went there once or twice with Mr. Boomer's representative, Mr. Rodgers, and opened the door for Mr. Rodgers to permit him to take some supplies out of the warehouse which were being stored therein. Mr. King further testified to the effect that people were storing wool and taking it in and out of the warehouse; that he had a key and whoever was permitted to go in there he let them in when he knew they were entitled to go in and obtain their stuff (Rec. p. 61), and that he kept the warehouse locked when he was not present, and was by the warehouse every day when he was going to and from home. He stated that he knew Frank H. Haveman well; that Haveman never, at any time, attempted to dispute his right to the control and dominion over the warehouse, and that G. B. Quarles never disputed his (King's) right to the control or dominion over the warehouse, or anyone else (Rec. p. 62).

The testimony of Mr. King was taken in two separate depositions. The record of testimony of the first deposition is found at pages 60 to 63 of the Record. In his last deposition he explained some of the testimony given in his first deposition to the effect that when he testified in a former deposition, that he went by the warehouse substantially every day, he meant that he had to go by the warehouse approximately three times a day in going to and from home, either in his car or on foot, and that he traveled along Main Street, which is situated about two blocks from the

warehouse (Rec. p. 79), but that there are no buildings or any trees or obstructions to the view between the warehouse and Main Street where he passed, and that in going from his home the warehouse would be visible to him for five blocks (Rec. p. 81).

The fact that Mr. King was custodian of the property and recognized as such is borne out by the fact that the Sheriff, T. J. Stroud, testified that when he appointed Mr. Haveman as custodian under the forclosure proceedings, that Haveman was appointed keeper of the warehouse subject and subordinate to the duties of H. G. King as custodian under the attachment proceedings, and the further fact that the Sheriff stated that at the time that he served the papers of the foreclosure proceedings that he already had possession of the property under the writ of attachment and whatever was done was done subject thereto (Rec. p. 71). Mr. King was not at any time disturbed or interferred with in his possession or right as custodian of the warehouse. The mere fact that G. B. Quarles, the defendant, was permitted or did store and deliver certain wool that was in the warehouse during the time that Mr. King was acting as custodian would not, in view of the character of the property and the fact that Quarles recognized the validity of the attachment, be inconsistent with the custodianship of H. G. King. The property in and of itself being such that it could not be carried away or consumed by the use thereof in storing wool therein or delivering the same therefrom, would not require the same degree of actual seizure and custody on the part of the custodian as property which was capable of seizure and manual delivery and which might be taken away and destroyed or otherwise disposed of.

17 R. C. L. Sec. 78, P. 181.

The Court said in Young vs. Walker, 12 N. H. 502:

> "The mere fact, then, that the property is used by the debtor, would not seem to be enough to dissolve the attachment, so that another officer could acquire a lien upon it, particularly where he knew there was a subsisting attachment. The knowledge must, it is true, extend beyond the fact that the goods had been once under attachment. What act, what species of possession, and what degree of vigilance, will constitute legal custody, is often a question of difficulty, depending on a variety of circumstances, having respect to the nature and situation of the property, and the purposes for which custody and vigilance are required; and especially, to the notice of other officers, and persons having conflicting claims."

The same degree of strictness would not be required where the party questioning the validity of the attachment was the debtor, as in the present case, especially where such debtor at all times by his acts and conduct recognized the existence of the levy of the attachment.

Of course the contention of the appellants only become important in this case in the event that the Court should hold as a matter of law that the warehouse was personal property capable of manual delivery. If this Honorable Court should conclude as the trial Court concluded that the warehouse is personal property incapable of manual delivery then there is no merit to the appellants contention.

It is also suggested to your Honors that the appellants herein stand in no better position to question the validity of the attachment than G. B. Quarles. They claim their title to said warehouse through the foreclosure sale under the chattel mortgage in question. The chattel mortgage was given to secure the judgment which they had against their father, G. B. Quarles. By the terms of the mortgage it is provided that the mortgagee, H. L. McCaleb, Guardian

Ad Litem, did not waive the right of the judgment creditor, being the appellants herein, to share in the proceeds of the sale of any of the attached property in the suit of Citizens National Bank against Quarles. It is apparent, therefore, that the appellants herein had notice of the attachment by the terms of the chattel mortgage, and that their guardian ad litem, had full knowledge of the attachment against the warehouse. At the time the bill of complaint was filed the appellants were of age and by seeking to maintain this action they have fully ratified the acts of G. B. Quarles and their guardian ad litem. They could not accept the benefits and reject the burdens, so that in bringing this action the Appellants have clearly ratified the acts of their Guardian ad litem, H. L. McCaleb, and are bound thereby.

31 C. J. Sec. 55, p. 1013.

Having recognized the validity of an attachment, one may not thereafter object to it.

Lindsey vs. Mexican Crude Rubber Co., 197 Fed. 775.

Conduct of the defendant may make an otherwise invalid levy good by waiver or estoppel.

Jongewaard vs. Gesquire, 199 N. W. 585;

Tafts vs. Manlove, (Cal.) 14 Cal. 47;

Eisenbud vs. Crancimino, 69 N. Y. S. 672.

If a subsequently attaching creditor admits in his bill that an attachment has been issued at the suit of another creditor, levied, and the property placed in the custody of the law, such creditor is estopped to deny the validity of the levy.

Leo vs. Maxwell, 1 Hedd. (Tenn.) 365.

It is contended by Appellants on page 33 of their brief that neither the Sheriff nor Mr. King had any control, custody or possession of the warehouse at the time the chattel mortgage was given and prior and subsequent thereto. Yet the record is undisputed that on June 1, 1922, at the time the chattel mortgage was given, Quarles recognized at that time the lien of the attachment because in the mortgage that was made by him to H. L. McCaleb on the warehouse, he had a clause inserted to the effect that the giving of the mortgage did not waive the right of the judgment creditor, being H. L. McCaleb, Guardian ad litem, to share in the proceeds of the sale of any attached property. Moreover, on July 14, 1922, a month and a half after the execution of the mortgage in question, Quarles made and filed a motion in the Court in which the action was pending to discharge from the attachment the warehouse in question on the sole ground that the amount of property attached was excessive (Rec. pp. 65 and 66).

It is apparent that Quarles himself did not, during any of those times, consider that he had dominion over the warehouse. Furthermore, the order denying the motion to discharge the attachment was not made and entered until July 28, 1922, so that as late as July 28, 1922, the record shows conclusively that whatever use he made of the warehouse in the storing and handling of wool therein was done subject to and in recognition of the lien of the attachment.

According to Quarles' testimony (Rec. pp. 85 to 91), it will be seen that practically all his transactions concerning the storing of wool in the warehouse, about which he testified, occurred prior to July 28, 1922, at which time Quarles himself did not consider that he had dominion over the warehouse.

The absolute custody of the Sheriff of the warehouse in question is further borne out by the fact that when the warehouse was sold under execution in February of 1923, the warehouse was turned over to the purchaser by the Sheriff, who went into immediate, peaceable and absolute possession. At that time no attempt was made by Rose Loring Quarles, or anyone in her behalf, to question the right of the Sheriff to turn the property over to the purchaser at the sale, which was the Appellee in this action.

In conclusion we respectfully submit that the record and the authorities amply support the decision of the Trial Court and that the judgment herein made and entered should be affirmed.

Respectfully submitted,

T. D. JONES,

C. W. POMEROY,

RALPH H. JONES,

E. H. CASTERLIN,

Solicitors for Appellee.